Neutral Citation Number: 2015 EWHC 3419 (Comm

Case No: CL-2014-000617

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 26/11/2015

Before :

THE HON. MR JUSTICE POPPLEWELL

- -

Between :

MOLTON STREET CAPITAL LLP	**Claimant**
- and -	
(1) SHOOTERS HILL CAPITAL PARTNERS LLP	**Defendants**
(2) ODEON CAPITAL GROUP LLC	

- -
- -

Mr Simon Atrill (instructed by **Olswang LLP**) for the **Claimant**
Mr Conall Patton (instructed by **Nabarro LLP**) for the **Second Defendant**

Hearing dates: 26 -30 October, 3 November 2015

- -

Approved Judgment

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

.....

THE HON. MR JUSTICE POPPLEWELL

Mr Justice Popplewell:

Introduction

1. The Claimant ("Molton Street") brings a claim as buyer from the Second Defendant ("Odeon") for wrongfully cancelling a contract of sale of junk bonds concluded on 16 June 2014 at a price of 22% of face value. Molton Street had sold the bonds on to Morgan Stanley & Co ("Morgan Stanley") at 35.5%, and claims damages together with an indemnity against liability to Morgan Stanley. Odeon disputes that a contract was concluded, and challenges the claim on the further alternative grounds that the transaction involved breaches of regulatory laws, or that the loss claimed is irrecoverable as being too remote or tainted with illegality.

2. The trade was initially negotiated by Molton Street with the First Defendant ("Shooters Hill"), which was negotiating the buy side of the transaction with City & Continental Securities LLP ("City & Continental"). Shooters Hill was replaced by Odeon following the conclusion of the negotiations, both as buyer from City & Continental and as seller to Molton Street. Molton Street initially brought a claim also against Shooters Hill, but that claim has been compromised and Shooters Hill has played no part in the trial before me.

3. Molton Street is a small broker dealer operating in London, which has been authorised and regulated by the Financial Conduct Authority ("the FCA") from the time it was formed in early 2013. One of its members was Mr Rajat Rohailla, through a wholly owned vehicle, Inverness Consulting Ltd. Mr Rohailla worked full time for the firm pursuant to a consultancy agreement, again through Inverness. When acting as a dealer rather than a broker, Molton Street traded on a "matched principal" basis, that is to say buying and selling securities on back to back terms save as to price.

4. At the relevant time Shooters Hill was also a small broker dealer in London, regulated and authorised by the FCA, whose dealings in relation to the current dispute were conducted by Mr Zeshan Ashiq. It was not sufficiently capitalised to trade as principal on the deals it negotiated. Accordingly it had an arrangement with Odeon whereby if it had negotiated a buy and sell transaction, Odeon would step into its shoes as the contracting party with the buyer and seller, in return for Shooters Hill being paid a part of the turn which Odeon made. Mr Rohailla was aware of the existence of this arrangement at the time of the negotiations for the disputed transaction.

5. Odeon operates as a broker dealer in the United States, conducting its business primarily from its office in New York, with some sales and trading being conducted from other offices. It has at all material times been regulated by the Securities and Exchange Commission ("the SEC") via the Financial Industry Regulation Authority ("FINRA"), of which it is a member. Its majority owner, co-founder and head trader in fixed income securities is Mr Evan Schwartzberg. Its co-founder, minority shareholder and compliance officer is Mr Van Alstyne. Mr Schwartzberg and Mr Van Alstyne are Odeon's two Principals, identified as such on its website. Mr Miron Nissim worked at the time in Odeon's back office in New York. When Odeon acted as a dealer for its own account, it usually

traded, like Molton Street, as what it termed a "riskless principal", i.e. buying and selling on back to back terms save as to price.

6. City & Continental was another small broker dealer authorised and regulated by the FCA in London. Mr Agresta conducted negotiations on its behalf in relation to the disputed transaction.

7. The disputed trade was the first transaction concluded between Molton Street and Shooters Hill. There had been some prior trading directly between Molton Street and Odeon, comprising ten sales by Molton Street and one sale by Odeon. Mr Rohailla had on those occasions dealt with a trader at Odeon called Mr Ron Tesmond, who played no significant part in the disputed transaction.

8. The bonds which are the subject matter of the dispute were a series of residential sub-prime mortgage backed securities issued in 2007 by a special purpose entity underwritten by Bear Sterns & Co Inc, the well known Bank headquartered in New York, which failed in the financial crisis of 2008 and was sold to JP Morgan Chase. When issued they had a face value of US$10,124,000, and a Moody's rating of "Aaa". By the time of the disputed transaction the face value was US$ 8,191,333 and the rating "C (sf)". The disputed transaction was in respect of the entire tranche of the class of securities issued ("the Bonds"). In 2014 the market in the Bonds was illiquid because they were not the subject of regular trading. By reason of their illiquidity and opacity, pricing of the Bonds was a matter of subjective judgment on which views might differ considerably, as the circumstances of this case illustrate. Prices in this market are expressed as a percentage of the face value of the Bonds. Fractions of a percentage are commonly expressed as "ticks", a tick being 1/32 of 1%. A price of 54-8, for example, is a price of 54.25% of the face value of the Bonds. It was common ground that settlement for trades in this market normally takes place on the third business day after the trade is concluded in the absence of contrary agreement.

The rival arguments in outline

9. Molton Street claims that the contract is governed by English law and that Odeon was in breach of contract in cancelling the trade and failing to deliver the Bonds. It claims damages comprising (a) its loss of profit on the sale to Morgan Stanley, amounting to a little over US$1.1 million; alternatively damages representing the difference between the price payable to Odeon and the value of the Bonds on 19 June 2014, the settlement date; and (b) an indemnity against liability to Morgan Stanley for failure to deliver the Bonds. Because the alternative damages claim, based on value rather than lost profit on the Morgan Stanley sale, was introduced by a relatively late amendment, it was ordered that quantification of damages on this basis, if relevant and recoverable in principle, should be addressed at a subsequent hearing.

10. Odeon contends that the putative proper law of the contract is New York law. Its defences can be briefly summarised as follows:

    (1) There was no concluded contract by reason of Odeon's disclaimer ("the Disclaimer") which provided in relevant part:

> ". …. ***Indicative prices, bids, offers are not Firm unless so indicated and trades cannot be considered 'good trades' without express consent of the Principals of the firms***."
>
> The effect of the Disclaimer is that the express consent of Mr Schwartzberg and Mr Van Alstyne as Principals was required as a condition precedent to the existence of a binding contract, and no such consent was ever given.

(2) Alternatively the contract was voidable, and has been avoided, by reason of dishonest non disclosures by Mr Rohailla which contravened the United States Securities Exchange Act 1934 ("the 1934 Act"). The non disclosures relate to what Mr Rohailla knew about potential problems with City & Continental delivering the Bonds and what he said to persuade City & Continental to confirm the trade.

(3) Alternatively the contract was validly rescinded for unilateral mistake under New York law, Odeon's mistake being (primarily) that there was no issue with City & Continental's prospects of delivering the Bonds.

(4) Alternatively the contract contained an implied term, whether governed by New York law or English law, that Odeon would be excused from performance if City & Continental failed to perform.

(5) Alternatively if the contract is governed by English law, it was subject to an implied term that Molton Street had not breached or would not breach s. 89 of the Financial Services Act 2012. Molton Street was in breach of the implied term by reason of Mr Rohailla's dishonest statements to Mr Agresta (a) that he had sold the Bonds to Morgan Stanley at 22 and (b) that Morgan Stanley had sold the Bonds on.

(6) Alternatively Molton Street's damages claim fails (a) as being too remote or (b) under the principle *ex turpi causa non oritur actio*, the offending conduct relied on for this aspect of the defence being a series of lies told by Mr Rohailla to Morgan Stanley to the effect that City & Continental were offering the Bonds at mid 30s or 35 whereas they were being offered to Mr Rohailla at 21 or 22.

11. It was common ground that:

(1) if the putative proper law of the contract is New York law, defences (1) to (4) and (6)(a) fall to be decided in accordance with New York law and defence (5) does not arise (although it was also agreed that in the absence of New York law evidence on some of the sub issues on defence (1), the Court should apply English law to those sub issues);

(2) if the putative proper law is English law, defences (1), (4), (5) and (6)(a) fall to be decided under English law; and defences (2) and (3) do not arise;

(3) whatever the putative proper law, the *ex turpi causa* defence (6)(b) falls to be decided in accordance with English law, both because the principle is one of judicial abstention under the lex fori, and because in any event there was no

evidence of New York law (save for one aspect in relation to the indemnity claim), so that the Court proceeds on the fiction that New York law on the issue is the same as English law.

Narrative

12. I heard evidence from Mr Rohailla and Mr Jamal on behalf of Molton Street, and Mr Nissim, Mr Schwartzberg and Mr Van Alstyne on behalf of Odeon. Mr Rohailla was not a satisfactory witness. As my findings below illustrate, the documents demonstrate that he acted dishonestly in the course of the negotiations, and the kindest thing I can say about his evidence to the Court is that it was a misguided and unconvincing attempt to maintain an innocent explanation for his conduct. The other witnesses were all doing their best to assist the Court, and where I accept or reject their evidence it is on the basis of its cogency measured against the contemporaneous documents and inherent probabilities.

Monday/Tuesday 9/10 June 2014

13. In June 2014 the Bonds were held by Tilden Park Capital Management LP ("Tilden Park"), a hedge fund based in New York. On 9 June 2014 Tilden Park initiated an offer of the Bonds, alongside other securities, as part of a Bid Wanted In Competition ("BWIC"). The BWIC was sent to dozens of market participants inviting bids by 1030 New York time on Tuesday 10 June 2014, and indicating that there was a reserve applicable (whose amount was undisclosed). A copy of the BWIC was sent to Odeon. One of Odeon's traders, Mr Tesmond, circulated it to Mr Rohailla, who also received it from four other institutions. In the form passed on to Mr Rohailla, it did not give the identity of the seller, Tilden Park.

14. The BWIC generated "price talk" from seven large banks, that is to say indications of the levels at which bids might be expected which were circulated by the banks to selected potential clients or counterparties. The price talk was in the low to mid 40s, except for JP Morgan Securities whose price talk was mid 60s. Odeon received the price talk circulated by JP Morgan. None of the price talk was circulated to Molton Street.

15. The BWIC generated firm bids from 13 bidders, which ranged from 38 to 54.25, averaging in the mid 40s. One of the bids came from Mr Rhodes at Morgan Stanley in New York, who bid 40. The level of these bids was not known to Molton Street, Shooters Hill or Odeon at the time of the disputed transaction. None of the bids was accepted. On 10 June 2014 Tilden Park sent an email to the BWIC recipients confirming that the Bonds had not traded. That may have been because the bids did not reach the reserve, but that is not necessarily so. With illiquid securities, a BWIC is sometimes used to mark to market, i.e. value the securities in the books of the party holding them.

Friday 13 June 2014

16. All times are given in British Summer Time, which was five hours ahead of New York time.

17. At 0959 on 13 June 2014, Mr Ashiq of Shooters Hill received an email from Mr Agresta of City & Continental. Mr Agresta said he had an offer of the Bonds to him at 20 but said he was "not sure how genuine it is". The email included the Bloomberg generated information about the Bonds which included some indication of price spreads, but given their illiquidity and opacity, this information on Bloomberg was not generally regarded as a sound guide to pricing of the Bonds.

18. At 1314 Mr Ashiq emailed Mr Rohailla asking whether he had an interest in the Bonds. Following encouragement, he sent another email at 1501, saying that he had a starting indication of 20 and asking Mr Rohailla to let him know if he could get any interest. At 1513 Mr Rohailla responded asking Mr Ashiq to get a firm offer. Mr Rohailla spent about 10 minutes trying to value the Bonds but reached no concluded view.

19. At 1513 Mr Rohailla had a Bloomberg exchange with Mr Rhodes of Morgan Stanley in which Mr Rohailla said that the holder of the Bonds was "a legacy guy", meaning someone who had held the Bonds since before the financial crisis, and was looking to sell. Mr Rhodes asked whether the Bonds were being offered, i.e. whether this was a serious offer to sell or merely an inquiry designed to canvass opinion on price. Mr Rohailla's response at 15.13 was to ask Mr Rhodes "what's the px [i.e. price] context? he's saying h20s [i.e. high 20s]". Mr Rohailla's evidence was that what he meant was that he, Mr Rohailla, was looking to receive a bid from Mr Rhodes in the high 20s. This is not what he said, and is not a meaning the Bloomberg message can bear in the context of the exchanges before and after it. The "he" was clearly a reference to "the legacy guy". I have little doubt that what Mr Rohailla meant, and intended Mr Rhodes to understand, was that Mr Rohailla's seller was indicating a price of high 20s. This was a deliberate untruth on Mr Rohailla's part: the indication he had received from Mr Ashiq was at 20. It was a lie intended by Mr Rohailla to induce Mr Rhodes to bid a higher price than he would have done had he known the true price at which Mr Rohailla had been given an indication by his seller.

20. At 1514 Mr Rhodes asked Mr Rohailla to get a firm offer. At 1519 Mr Rohailla told Mr Rhodes that there was no firm offer, but that what was being asked for was an indication to get the ball rolling. At 1523 Mr Rhodes told Mr Rohailla that "I could be in h20s if that works for him". The "him" was a reference to Mr Rohailla's seller.

21. At 1533 Mr Ashiq told Mr Agresta that "I have a bid at 20 on the full size (STC) [i.e. subject to confirmation]." He asked Mr Agresta to check with his seller. There is no record of this reflecting an indicative bid made by Mr Rohailla to Mr Ashiq, and Mr Rohailla did not suggest it did. It may therefore have come from another source.

22. At 1626 Mr Agresta emailed Mr Ashiq that "apparently the price was wrong! I am trying to understand what is happening". At 1628 Mr Agresta emailed Mr Ashiq "I asked another broker, he told me it was closer to 40! Looks like the original broker messed it up. I am trying to find out, don't tell anything to the buyer yet".

23. At 1706 Mr Agresta sent Mr Ashiq an email offer at 20.5 "subject to a quick call". At 1713 Mr Ashiq sent the offer to Mr Rohailla in identical terms save that the price was 21, saying "not sure whether you can reach your guy now or whether we're late. Here is the offer I have (subject to a quick call as you'll see)". Mr Ashiq revealed to Mr Agresta that he had added on 0.5% when offering the Bonds on, the purpose of which was to compensate Shooters Hill and possibly also City & Continental. Mr Rohailla responded to Mr Ashiq that it would have to be left till Monday and that his buyer might be annoyed because this was not a firm offer.

24. It was put to Mr Nissim (on the basis of Shooters Hill's Defence in the action) that Mr Ashiq had called him that afternoon to ascertain that Molton Street had traded with Odeon in the past and was already an approved counterparty; and to tell Mr Nissim that Shooters Hill was arranging a trade in Bear Sterns sub-prime asset backed securities which Odeon would buy from City & Continental and would sell to Molton Street. Mr Nissim had no recollection of any such conversation although he accepted it was possible. It seems to me probable that Mr Ashiq would have checked with Odeon that Molton Street was a satisfactory counterparty for Odeon in relation to a potential trade of this nature before conducting detailed negotiations, and since Shooters Hill had not previously concluded a trade with Molton Street there is no reason to think Mr Ashiq already knew this. I find that a conversation to that effect did take place on the Friday.

Monday 16 June 2014

25. Discussions resumed on Monday morning after the weekend. At 0836 Mr Agresta sent an email to Mr Ashiq asking him to pursue the matter. Mr Agresta's message included the statement "I can't trust the broker who sent it to me". Mr Ashiq asked whether the offer was at the same price and was told by Mr Agresta at 1053 that it was now 21.

26. At 1122 Mr Rohailla and Mr Ashiq spoke on the phone. Mr Ashiq said that the offer was 21 and he would ask his seller to "refresh" it. During the course of the conversation, Mr Rohailla said "Usually the guy he likes to see an offer before wasting time … and we will be able to get it done around there if … I am hoping he can get to 21. I think 21 is a bit steep for this one". The "he" who Mr Rohailla was telling Mr Ashiq he hoped could get to 21 was Mr Rohailla's buyer. The premise of the conversation was that Molton Street would sell on at the same price as it paid.

27. It was not true that Mr Rohailla hoped to get his buyer up to 21 or that he (Mr Rohailla) thought that a price of 21 was a bit steep. On the contrary, he had been told by Mr Rhodes on the Friday that high 20s would be feasible. Moreover Mr Rohailla's evidence in his witness statement was that on the Monday morning he had done some research and calculations, as a result of which he had himself formed the view that the Bonds were worth in the low 40s. Mr Rohailla described this as slightly more than a back of the envelope calculation. I cannot draw any safe conclusions from Mr Rohailla's evidence about what sources he used, and do not feel able to accept Odeon's case that he gained access to, and relied on, the price talk circulated the previous week**.** However, whatever sources he used, his statement to Mr Ashiq that he thought 21 was a bit steep was not true, nor was the

impression he sought to convey that his buyer was at present prepared to pay less than 21.

28. At 1322 Mr Ashiq told Mr Agresta that his buyer had indicated he could engage at about 21, but that he would need an offer to get things moving. At 1333 Mr Rohailla emailed Mr Ashiq asking whether he had an offer.

29. At 1358 Mr Agresta sent an email to Mr Ashiq again offering the Bonds at 21 "subject to a quick call" and inviting a bid. At 1406, Mr Ashiq emailed Mr Rohailla offering the Bonds at 22 subject to a quick call.

30. At 1408 to 1409, Mr Rohailla had Bloomberg exchanges with Mr Rhodes, during which at 1409 he said "sellers looking for a bid in the mid 30s". Mr Rohailla's evidence was that by this he meant that he, as the seller to Mr Rhodes, was looking for a bid in the mid 30s. I have little hesitation in rejecting that evidence. It is clear from the context that by using that language he meant, and would have been understood to mean, that it was his seller who was looking for a bid in the mid 30s. This was untrue: Mr Ashiq's offer, subject to a quick call, was at 22. This again was a lie told by Mr Rohailla with the intention of inducing Mr Rhodes to make a higher bid for the Bonds.

31. At 1455 Mr Rohailla had a telephone conversation with Mr Rhodes. That conversation, which was recorded, included the following exchanges:

    (1) Mr Rhodes: "He's looking for mid 30s?"; Mr Rohailla: "that is what he is looking for yeah …"

    (2) Mr Rhodes: "34 bid for that". This was said decisively, after a considered pause, indicating a firm bid. It was confirmed as a firm bid in a Bloomberg message at 1456 during the course of the call, in which the 34 price is unqualified. Mr Rohailla understood it as a firm bid because his next communication to Mr Ashiq was a firm bid (see below).

    (3) Mr Rhodes: "He wants 34 or he wants mid 30s?" Mr Rohailla: "Yes, correct".

    (4) After Mr Rohailla had said that he would seek to get Mr Rhodes a firm offer, Mr Rohailla went on "I just want to see where he is say[ing] they can get to on this … I'll try to save you some bucks and then you can pay me whatever you want", to which Mr Rhodes agreed.

32. Mr Rhodes' assent to Mr Rohailla's statement that "I'll try to save you some bucks and then you can pay me whatever you want" reflected a stated assumption that Mr Rohailla would seek to reduce as much as he could the price at which he, Mr Rohailla, bought from his seller, because he would be selling on to Mr Rhodes at the same price, subject only to what Mr Rhodes would agree to pay him on top. It is inconsistent with Mr Rohailla's evidence that Mr Rhodes envisaged and understood that Molton Street was to be entitled to make whatever turn it could on the difference between the price at which it bought and sold and that Mr Rhodes knew this. Had that been the assumption, it would have made no sense for Morgan Stanley effectively to pay twice by paying something to Molton Street in

addition to its unknown profit; and nothing which Mr Rohailla would be doing with his seller up the line would be "trying to save [Mr Rhodes] some bucks."

33. I reject Mr Rohailla's evidence that when he twice confirmed in the conversation that "he" wanted mid 30s he was referring not to his seller but to himself, so as to convey the same as if he had said "I" want mid 30s. That was not what he said and it is clear from the language he used and from earlier references in the conversation to an offer "from a legacy guy" and what "these guys have shown me" that the "he" was a reference to his seller, not himself. He intended Mr Rhodes to understand that the seller to him up the line wanted a bid in the mid 30s. Again this was a lie told by Mr Rohailla with the intention of inducing Mr Rhodes to make a higher bid for the Bonds.

34. At 1501, Mr Rohailla sent to Mr Ashiq a bid at 21. This was a firm bid, as Mr Rohailla confirmed to Mr Ashiq in a phone call at 1502.

35. At 1504, Mr Rohailla reverted to Mr Rhodes by way of a Bloomberg message saying "So offer is /35- they some room dude. Shall I go in with a 32-00?" I reject Mr Rohailla's evidence that this was merely a reference to an offer he was himself making at 35. The context was that, so far as Mr Rhodes was given to understand from the previous exchange, Mr Rohailla was negotiating back to back prices, and the reference to "*they* some room" confirms that what Mr Rohailla was purporting to relay was the offer which had come from his seller. Again this was a deliberate lie on Mr Rohailla's part. "Shall I go in with a 32-00" was obviously an inquiry as to whether Mr Rohailla should bid at 32 to his seller, again on the basis that it was Mr Rhodes' decision on what the bid up the line to Mr Rohailla's seller should be, because that would determine the price at which Morgan Stanley would buy from Molton Street, subject only to any payment on top agreed between them. Mr Rohailla's evidence that 32 was a price he was suggesting Mr Rhodes should pay to him as a stand alone deal makes no sense: it would involve a seller asking a buyer who has just previously offered him 34 if he would now like to offer him 32 i.e. less.

36. At 1508, Mr Rhodes sent a message by Bloomberg saying "we lift ….@35-00" indicating that he was making a firm offer at 35 and "I will pay you". This was again clearly on the basis that 35 would be the offer which Molton Street would make to its seller and that Molton Street's compensation would come from whatever was agreed with Morgan Stanley as a payment on top.

37. Shortly thereafter during the course of a telephone conversation starting at 1509 Mr Rohailla suggested that Mr Rhodes might want to "play back and forth a little bit" rather than going straight in at 35, and persuaded Mr Rhodes to go in with a bid of 34. Mr Rhodes said "I want to make sure you make some money on this cos we've been … going back and forth". This was, again, only consistent with the premise that Mr Rohailla would sell to Mr Rhodes at the price at which he bought from his seller, subject only to such amount as would be agreed between the two of them as payment on top. It is inconsistent with Mr Rohailla being able to make a secret profit by way of turn on the deal.

38. At about the same time, Mr Ashiq asked Mr Rohailla at 1508 how long his firm bid was valid and Mr Rohailla responded at 1509: "Mate it's like now, I showed

the offer and they have bid back". This involved further deliberate deception on Mr Rohailla's part in two respects. First Mr Rohailla had not showed his buyer "the offer" i.e. Mr Ashiq's offer at 22 subject to a quick call. Secondly his buyer had not bid back at 21, which was what Mr Rohailla meant and would have been understood as meaning when saying that "they have bid back" in the context of an inquiry of how long the firm bid at 21, which Mr Rohailla had conveyed to Mr Ashiq at 1501 and 1502, remained valid.

39. Mr Rohailla pressed Mr Ashiq to get a response. At 1510 Mr Rohailla phoned Mr Ashiq. Mr Rohailla said "This is the level so he says we should be able to go, let's get it done …" This was another deliberately false statement by Mr Rohailla that 21 was the level his buyer would go to, consistently with the general message to Mr Ashiq that he was faithfully relaying the offer he was getting from his buyer.

40. At 1514 Mr Rohailla sent Mr Ashiq an email saying "…/22 should normally mean a quick call". Mr Rohailla's evidence is that it was intended to be an increase in his firm bid from 21 to 22. This is not how it reads, and is not consistent with the content of the following conversation (see below). It is to be read as Mr Rohailla saying that if the seller has offered at 22 subject to confirmation, which is where Mr Agresta's offer rested, it should only take a quick call to turn that into a firm offer.

41. At 1520, Mr Rohailla phoned Mr Ashiq again. During that phone call Mr Rohailla said "The guy is around 22 … so please I need an offer". This was a reference to the bid his buyer was prepared to make, indicating that he might go to 22 if Mr Ashiq got a firm offer at that price from his seller, whose offer at 22 was still "subject to a quick call". This appears to have been another deliberate deception by Mr Rohailla intended to convey to Mr Ashiq that Mr Rohailla's buyer was only prepared to pay 21 or 22 when Mr Rohailla knew he had indicated he would pay 35. But this point was not put to Mr Rohailla in cross examination nor relied on in Odeon's submissions (presumably because Odeon's case, which I have rejected, was that a firm bid at 22 had already been made by Mr Rohailla, which formed the basis for a point put in cross examination and submissions that what Mr Rohailla said in the later conversation at 1617 was a lie). For this reason I do not treat what Mr Rohailla said in this conversation as a lie for the purposes of deciding the issues in the case.

42. At 1533 Mr Rohailla emailed Mr Ashiq to say "Guy just called gave me an earful. What is going on man?" At 1555, Mr Rohailla had another phone conversation with Mr Ashiq. Mr Ashiq said he still had not got any answer from his seller. During that conversation, Mr Rohailla suggested that his buyer had been saying 18 or 19 on the previous Friday when he had spoken to him as the price at which he would be interested. Mr Rohailla went on "… because it was relatively close … I was thinking there was 1, 2 or 3 points here and there". Again this was simply a lie by Mr Rohailla. His buyer had not been at 18 or 19 the previous Friday, and Mr Rohailla was concerned to give the false impression that 21 or 22 was as high as his buyer was likely to go in order to secure a purchase at that price from Shooters Hill for Molton Street's own benefit.

43. Between 1601 and 1650 there were some exchanges between Mr Ashiq and Mr Agresta in which Mr Ashiq was pressing for a firm offer from City & Continental.

At 1617 Mr Rohailla had another conversation with Mr Ashiq, during which Mr Rohailla said "The guy well he's bid you know against that like you know at 22 …" Mr Patton cross examined Mr Rohailla on the basis that this was another lie suggesting that Mr Rhodes' bid was at 22. But at this stage Mr Rohailla had not raised his firm bid to Mr Ashiq from 21 to 22. The statement is more naturally to be read as Mr Rohailla saying that his client had bid against (i.e. in response to) Mr Ashiq's offer of 22. What was untrue about that was the implication it carried that Mr Rohailla had relayed to his buyer the offer at 22 (stc) and had been given by his buyer a bid of 21 to relay to Mr Ashiq.

44. At 1652, Mr Ashiq emailed Mr Rohailla to say that Mr Agresta needed 5 to 10 minutes. Mr Ashiq said, "Between you and I, I understand better now. It seems the guy did not have full control and he needs to ascertain it before giving us the firm offer". Mr Rohailla suggested that he understood this to mean that Mr Ashiq's seller lacked authority within his organisation to approve the trade. It is equally consistent with Mr Agresta's seller not himself yet having a firm offer.

45. At about 1708, Mr Agresta finally sent Mr Ashiq what the latter understood to be a firm offer at 21.

46. In an email at 1709 Mr Ashiq made a firm offer to sell the Bonds to Mr Rohailla at 22.

47. At 1710, Mr Rohailla sent Mr Rhodes a Bloomberg message saying that the Bonds were "offered at 35". Against the background of their previous exchanges, this was meant to convey that Mr Rohailla had received an offer at 35 from his seller. It was another deliberate lie by Mr Rohailla.

48. Mr Rhodes responded by a Bloomberg message at 1711 saying "Lift", meaning that he accepted that offer.

49. Thereupon at 1712 Mr Rohailla emailed Mr Ashiq accepting the latter's firm offer to sell the bonds at 22. At about the same time Mr Ashiq communicated to Mr Agresta acceptance of the latter's firm offer at 21.

50. At 1712 Mr Rohailla also sent a Bloomberg message to Mr Rhodes confirming the sale and saying "will send you the ticket now. where do i sell these to you?" Mr Rhodes responded "35-16" to which Mr Rohailla answered "nice one. thanks bro". This exchange meant and was understood to mean that Mr Rohailla had purchased from his buyer at 35 and was asking how much Mr Rhodes would agree to add to that price as the remuneration for Molton Street, with Mr Rhodes offering 0.5% and Mr Rohailla gratefully agreeing. It was a discussion and agreement as to how much on top of the price of 35 should be charged to Morgan Stanley to reflect remuneration to Molton Street, on the assumption that that constituted the entirety of Molton Street's profit. I reject Mr Rohailla's evidence that it was intended to be in addition to any profit Molton Street would make by way of the difference between the price at which it bought and the price at which it sold. Not only was the existence of any such turn inconsistent with the tenor of the prior discussions, but there would be no reason for Mr Rhodes to pay 0.5% in addition to any turn which Molton Street were to make, especially without knowing or inquiring how much that turn was.

51. At 1712 Mr Ashiq called Mr Nissim at Odeon and spoke to him for a little under two minutes. The timing of the call is logged but the content was not recorded, or at least no recording was in evidence. Mr Nissim, unsurprisingly, had no specific recollection of the conversation, but it is likely, as he accepted, that Mr Ashiq told him about the conclusion of the trades by firm bids and offers which had just occurred; alerted him to the fact that Odeon would need to issue trade tickets to the parties; and gave Mr Nissim the details which were necessary to enable him to do so and for Odeon to settle the trade in each direction.

52. At 1713 Mr Rohailla phoned Mr Ashiq and had a 30 second conversation. On the attributed timings, Mr Ashiq would still have been on the call with Mr Nissim and it is possible that he interrupted it to take the call from Mr Rohailla. Mr Ashiq confirmed to Mr Rohailla that the deal would be settled through Odeon, at which Mr Rohailla showed no surprise or dissent but simply responded "OK". Mr Ashiq said that he would get Mr Nissim to send the trade ticket. Mr Rohailla said that in any event he would send the Bloomberg trade ticket at 22 to Shooters Hill.

53. At 1714, Mr Rohailla sent to Mr Ashiq an email with "VCONN TRADE CONFIRMATION" in the subject field, setting out the terms of the trade in the format used on Bloomberg, confirming the purchase at a price of 22 and adding the note "thanks for the trade". Although sent to Shooters Hill, Mr Rohailla knew by this time that the trade was to be with Odeon as the counterparty.

54. In an email at 1718 Mr Ashiq was then alerted by Mr Agresta that there was a problem on the seller's side. Mr Agresta said "Please cancel the trade, he has done on my side yet (sic)". What was meant was obviously that the deal up the line on his side was *not* "done" yet.

55. At 1724 Mr Rohailla phoned Mr Ashiq who responded by asking Mr Rohailla to hold. When Mr Ashiq gave Mr Rohailla his attention he said "There's something crazy going on here but one second". That was a reference to this transaction. Mr Rohailla asked him to send the trade ticket for his back office and said he had to leave shortly for a doctor's appointment. Mr Ashiq asked him to hold and left him on hold for over two minutes, after which Mr Rohailla hung up.

56. At 1727 Mr Rohailla sent a trade ticket to Mr Rhodes confirming the sale at 35.5, in similar terms and format to the one he had sent to Mr Ashiq.

57. At 1729 there was a phone call between Mr Rohailla, Mr Ashiq and Mr Agresta. Near the beginning of the call Mr Agresta put them on hold, so that it continued as a conversation between Mr Rohailla and Mr Ashiq alone. Mr Ashiq explained that he had had an email from the seller's side saying wait for an email confirmation, and that was why he was trying to put them on the phone together. This may have been a reference to the "[not] done yet" email at 1718. Mr Rohailla responded "as far as I'm concerned we have traded this bond, yeah. I bought it free from you at that price and I sold it already at that price…." Mr Van Alstyne's evidence, which I accept, was that the expression "free" connotes a contemporaneous purchase and sale at a "flat" price, i.e. at the same purchase and sale price, with the broker/dealer remunerated by a payment on top. What Mr Rohailla meant and was understood to mean was that he had sold the Bonds to his buyer at the same price as he had agreed to pay to Shooters Hill. He was anxious

to dissuade Mr Ashiq's seller or someone further up the chain from unravelling what he thought was a concluded trade because of the very large turn Molton Street was to make on it; in doing so he was concerned not only to say that he had sold on, which he believed to be true, but that he had done so on the terms which he had already described to Mr Ashiq, and the terms on which Mr Ashiq would understand him to have sold, namely at the same price subject only to an agreed payment on top from the buyer. That aspect was a deliberate lie.

58. At 1730 Mr Rhodes sent to Mr Rohailla a trade ticket confirming his purchase at 35.5 in similar format to the trade ticket Mr Rohailla had sent him at 1727.

59. At 1733, there was a further three way telephone conversation between Mr Rohailla, Mr Ashiq, and Mr Agresta, during which Mr Agresta said: "we have been told by the seller that the trade has not been confirmed…" He asked for Mr Rohailla's help saying that "you need to say to the guy [i.e. Mr Rohailla's buyer] that the trade has not been confirmed." Mr Rohailla's response was that as a result of a firm offer and bid, the trade with his buyer was complete and could not be undone. During the conversation Mr Agresta dropped off the line after saying "I am going to come back to do it". By this he meant that he would remedy the position and ensure that he had confirmation of the trade up the line. When speaking to Mr Ashiq thereafter, Mr Rohailla said: "The guy's actually sold his bond on to someone else". This was an assertion that Morgan Stanley had sold the Bonds on. Mr Rohailla had not been told this by Mr Rhodes or anyone else and although it was possible, he had no reason to believe it had happened. It is common ground that it was untrue: Morgan Stanley had not sold on the Bonds at that time. It was a statement made recklessly, not caring whether it was true or false.

60. At 1741 Mr Rohailla spoke to Mr Ashiq on the phone. Mr Ashiq told Mr Rohailla that it looked like they were getting confirmation from the seller. There was discussion about Molton Street buying from Odeon rather than Shooters Hill and the necessary Euroclear number to enable Odeon to issue the trade ticket. Mr Rohailla suggested that Odeon be paid one tick for performing this role.

61. At 1749 Mr Agresta sent Mr Ashiq an email confirming the sale from City & Continental at 21 in a format akin to a trade ticket. There is no record of what had enabled Mr Agresta to remedy his previous position and confirm the trade, as he had said that he would when he left the phone conversation. Nor is there any record of any prior communication to Mr Ashiq of his decision to that effect, although it seems to me likely that there would have been some, rather than Mr Agresta simply issuing a confirmation in a form akin to a trade ticket. Mr Ashiq responded at 1751 that Mr Nissim from Odeon would send City & Continental a confirming ticket.

62. At 1749 Mr Ashiq and Mr Nissim spoke on the phone for almost 3 minutes. It was put to Mr Nissim that Mr Ashiq told him of the problems which had been encountered with City & Continental earlier in the day, which Mr Nissim convincingly denied. There was no evidence from Mr Ashiq to that effect and the suggestion was based on little more than an inference from the length of the conversation. There is no evidence to suggest that Mr Ashiq was at this stage concerned by the earlier events of the day, or that he had any concerns that City &

Continental would not stand by the deal for which it had now issued a confirmation; and had he conveyed to Mr Nissim any real concerns over City & Continental's intention to perform, it is highly improbable that Mr Nissim in the back office would have been prepared to process the transaction, at the very least without consulting Mr Schwartzberg or Mr Van Alstyne.

63. At 1752 Mr Ashiq phoned Mr Rohailla to tell him that the latter was going to get the ticket from Mr Nissim at Odeon now. At 1754 Mr Rohailla was still waiting for the ticket and Mr Ashiq put him on hold and rang Mr Nissim. When he resumed the conversation with Mr Rohailla he confirmed that Mr Nissim was going to send the ticket.

64. Before Mr Ashiq had finished his conversation with Mr Rohailla, Mr Nissim made contact with Mr Rohailla on Bloomberg at 1754. This was the first contact between Molton Street and Odeon on this transaction. The Bloomberg messaging commenced with Odeon's Disclaimer.

65. At 1756 Mr Nissim said to Mr Rohailla on Bloomberg that "I understand that we are selling you [the Bonds] at 22, correct?" After checking that they were talking of the same Bonds by checking the ISIN number, Mr Rohailla responded on Bloomberg at 1758 "yes correct send me the trade ticket." Mr Nissim said he would.

66. At 1800 Mr Nissim sent a trade ticket to Mr Agresta confirming purchase from City & Continental at 21. This trade ticket bore the Disclaimer.

67. At 1801 Mr Nissim sent a trade ticket to Mr Rohailla confirming the sale by Odeon to Molton Street at 22. In addition to the details of the transaction the ticket said: "Notes: Odeon sells to Molton - thanks". The trade ticket bore the Disclaimer.

68. At 1802 Mr Nissim confirmed to Mr Rohailla on Bloomberg that he had sent the trade ticket and at 1805 Mr Rohailla confirmed to Mr Nissim that he had received it and thanked him.

Tuesday 17 June 2014

69. At 1224 on 17 June Mr Agresta emailed Mr Ashiq to say that there was a problem with the previous day's trade. The problem appeared to emanate from the next but one seller up the chain from City & Continental. Mr Agresta quoted an e-mail he had had from his seller which stated:

> "YES…AGREED…BUT U DO UNDERSTAND THAT THEY BACKING AWAY FROM THE TRADE AND SAYING THEY NEVER OFFERED AND ALL THEY WANTED TO DO WAS 'RE-ENGAGE' THE SELLER …COMPLETE NONSENSE … I JUST ASK THAT YOU TRY AND BREAK THE TRADE W/ YOUR BUYER … I WOULD LIKE TO THINK THEY WOULD UNDERSTAND WHAT WE ARE DEALING W/

> […]
>
> JUST TO REITERATE, THIS IS THE WHOLE TRANCHE THAT ISNT GONNA BE DELIVERED … THERE ARE NO OTHER BONDS TO SOURCE IN THE TRANCHE TO MAKE DELIVERY … YOUR BUYER REALLY HAS NO OTHER CHOICE BUT TO BREAK THE TRADE…"

70. At 1310 Mr Ashiq emailed Mr Nissim asking him to call, and when Mr Nissim called back at about 1327, Mr Ashiq told him that there were problems with the trade, and that City & Continental might not be able to deliver the bonds. Mr Ashiq said that he would push both sides to make sure the bonds would be delivered.

71. Mr Nissim went to see Mr Schwartzberg and explained the problem. Mr Schwartzberg recognised the Bonds from the BWIC of the previous week and recalled that they had not traded. He was surprised that the price seemed to be substantially below his recollection of the price talk during the BWIC.

72. At about 2000 (1500 New York time) Mr Schwartzberg called Mr Chin of Tilden and asked if he had sold the Bonds. Mr Chin said he had not, and asked at what price they had traded. When Mr Schwartzberg said low twenties, Mr Chin said he would pay more. This seemed strange to Mr Schwartzberg as Mr Chin had just said that he still owned the Bonds. Mr Schwartzberg asked why he was saying he would pay more for them if he owned the whole tranche, but at that point Mr Schwartzberg terminated the call because he decided he wanted nothing more to do with it. He was concerned that the Bonds might be being sold as part of a circular daisy chain transaction, designed artificially to inflate the value of the Bonds, or as part of some other potentially manipulative scheme.

73. Mr Schwartzberg raised these concerns with Mr Van Alstyne but they decided to leave it overnight before taking any action.

Wednesday 18 June 2014

74. On 18 June 2014 at 1123, Mr Ashiq emailed Mr Nissim to say there was not much update from City & Continental: "As things stand, they believe the bond won't get delivered tomorrow."

75. Mr Schwartzberg and Mr Van Alstyne decided to extricate Odeon from the trade and instructed Mr Nissim to issue a notice of cancellation. At 1528 Mr Nissim emailed Mr Rohailla. The subject line was "trade cancel". The text of the message was as follows:

> "Odeon has been notified that the seller will not be able to deliver the bonds and settle this transaction, therefore Odeon in its riskless principal role is cancelling both sides of this trade prior to settlement date."

76. At 1532 a message in similar terms was sent by Mr Nissim to Mr Agresta at City & Continental.

77. Shortly thereafter, Mr Nissim and Mr Van Alstyne had a call with representatives of City & Continental who claimed that the trade was a "good" one but that it would never settle by delivery.

Thursday 19 June 2014

78. A telephone conversation took place between Mr Rohailla, Mr Nissim and Mr Van Alstyne on 19 June 2014. Mr Rohailla said he was expecting delivery of the Bonds that day. Mr Van Alstyne reiterated that Odeon had broken the trade out of a concern that the transaction was manipulative.

79. There was no attempt by City & Continental to settle the trade or deliver the Bonds to Odeon that day. There was no evidence as to whether there were cancellations upstream of City & Continental following Odeon's notice of cancellation to City & Continental on 18 June 2014, nor indeed what contractual chain may have been in place above City & Continental, save for the exiguous inferences to be drawn from the email at 1224 on 17 June 2014 from Mr Agresta. Nor was there any evidence as to why City & Continental were unable or unwilling to tender the Bonds, save only that it was common ground before me that the Bonds remained in the ownership of Tilden Park throughout June 2014.

Morgan Stanley's position

80. Morgan Stanley has never sought to cancel or rescind the contract with Molton Street. On the contrary, in an email sent as recently as 19 October 2015 it confirmed that the trade was still open and it was waiting for delivery. It has not, however, advanced any claim against Molton Street for failure to deliver the Bonds. Mr Jamal's evidence was that Morgan Stanley had made clear to Molton Street throughout that it did not want to become part of the current litigation.

The Issues

81. It is convenient to consider the issues in the following order:

    (1) When and how was a contract formed, ignoring for these purposes the effect if any of the Disclaimer?

    (2) What was the putative proper law of the contract?

    (3) Did the Disclaimer prevent a contract being concluded?

    (4) Was the contract rescinded by reason of contravention of the 1934 Act (if applicable)?

    (5) Was the contract validly rescinded for unilateral mistake under New York law (if applicable)?

    (6) Did the contract contain an implied term that Odeon would be excused from performance if City & Continental failed to perform?

(7) Was Molton Street in breach of an implied term that it had complied or would comply with s.89 of the 2012 Act (if applicable)?

(8) Is the claim irrecoverable as being too remote?

(9) Is the claim irrecoverable by virtue of the *ex turpi causa* doctrine?

Issue 1: Contract formation (ignoring any effect of the Disclaimer)

82. Odeon accepted that but for the effect of the Disclaimer, Mr Nissim had, or would have had, authority to conclude a contract on behalf of Odeon. He had authority to conclude agreements by Bloomberg message and to issue trade tickets which in each case included the Disclaimer. It is not therefore necessary to address issues canvassed during the hearing as to whether Mr Nissim was held out as a "trader".

83. It was not suggested that there was any relevant difference between New York law and English law on the principles of contract formation. Accordingly this issue is not affected by the putative proper law. In New York law, as in English law, what is required is agreement by offer and acceptance on all essential terms and an intention to be bound.

84. On behalf of Molton Street, Mr Atrill submitted that in this market a contract was concluded by the acceptance of a firm (i.e. unconditional) bid or offer, unequivocally expressed, whether in a telephone conversation, email, Bloomberg message, or any other oral or written form. Alternatively it was concluded by the agreement of a trade ticket, which could either take the form of completion of the exchange of tickets in each direction (assuming them to be materially identical) or by express assent being given by one party to a trade ticket sent by the other. Accordingly the analysis as to contract formation in this case was either that (i) a contract was initially formed between Molton Street and Shooters Hill at 1712 by Mr Rohailla's email accepting Mr Ashiq's firm offer in his email at 1709, which was then novated to Odeon by Mr Rohailla's Bloomberg confirmation to Mr Nissim at 1758 alternatively his assent at 1805 to the terms of the trade ticket sent by Mr Nissim at 1801; alternatively (ii) that the agreement between Shooters Hill and Molton Street at 1712 gave rise to no binding contract but merely set in place terms to be confirmed by Molton Street and Odeon, with the contract between those two being concluded in the manner described in (i).

85. On behalf of Odeon, Mr Patton submitted that a trade ticket was an essential part of contract formation and no contract arose unless and until there was an exchange of trade tickets or express assent by one party to the other party's trade ticket. Accordingly there was never any agreement between Molton Street and Shooters Hill, but simply a contract at 1805 after assent to the trade ticket (subject to the effect of the Disclaimer).

86. It appears that the use of disclaimers is not uncommon in this market. There were in evidence examples of a number of disclaimers used by various participants, in differing terms, which would or might have had the express effect of postponing the moment of contract at least until exchange of trade tickets; but I am here concerned to analyse the position in the absence of any such disclaimers or express contract terms which cast light on when the parties intend to be bound.

The analysis is always subject to a contrary intention appearing from the particular terms of the parties' exchanges, including any standard terms or disclaimers. In New York law, as in English law, it is for the parties to decide at which stage they intend to be bound. They are, in the memorable phrase of Lord Bingham, masters of their contractual fate.

87. In such circumstances there are good reasons for treating parties in this market as intending to be bound at the moment of unequivocal acceptance of a firm bid or offer, rather than only upon completion of a trade ticket, in the absence of any specific indication of a contrary intention. It is clear that prices may change within a matter of hours or perhaps minutes, and the discussions between the market participants in this case sometimes made reference to bids and offers only being open for a short time. The participants were careful to distinguish between on the one hand indications, or offers/bids which were expressed to be conditional such as "stc" (subject to confirmation), and on the other hand firm offers or bids. If the latter were intended to have the same effect as the former and to be incapable of giving rise to binding commitments without a further formal exchange of documents in the form of trade tickets, there would be no need to distinguish between firm offers/bids and stc offers/bids. The concept of a "firm bid" is referred to in the Disclaimer. Moreover it was contemplated in this market that broker dealers might well be buying or selling on back to back terms save as to price (and indeed by all of Molton Street, Shooters Hill and Odeon and that the counterparties they were dealing with up the line would be doing so) such that it was desirable to have certainty about whether a bid or offer could be irrevocably accepted for the purposes of concluding a binding trade up or down the line. If there were no intention to be bound unless and until a trade ticket were produced, the delay might allow a change of heart which would falsify the legitimate reliance the counterparty could expect to place on a firm bid or offer. The trade tickets did not contain any essential contractual terms which had not already been agreed at the time of acceptance of a firm bid or offer, but merely collected them together in a single document. The additional details comprised a formal identification of the securities and their terms, with a calculation of the accrued element of the coupon, the settlement date which had already been implicitly agreed as a matter of normal market practice, and details necessary for the mechanical process of clearance and settlement through (for example) Euroclear. The trade ticket serves a purpose both as a formal documentary record collecting the contract terms into a single document, and as a tool for the back office to process the trade, but it is not a necessary element in the conclusion of the contract.

88. Accordingly had Shooters Hill been acting as principals, a contract with Molton Street would have been concluded at 1712 by Mr Rohailla's email accepting Mr Ashiq's firm offer in his email at 1709. But in this case it was known to Mr Rohailla and Mr Ashiq, when they were negotiating, that Molton Street's contract would be with Odeon as its counterparty, not Shooters Hill. In October 2013 Molton Street had exchanged KYC documentation with Shooters Hill, which was required in order for it to comply with FCA regulatory requirements if they did business; on that occasion Mr Ashiq sent settlement details which explained that Shooters Hill settled trades through Odeon. Mr Rohailla's own evidence was that although he didn't recall seeing this, he had been asked by Mr Ashiq in January

2014 whether Molton Street could trade with Odeon. His evidence was that Shooters Hill cleared its trades through Odeon because it did not have the necessary FCA regulatory authority to sell the Bonds to Molton Street as principal and such settlement parties assumed the counterparty risk. He expressed no surprise or dissent when told on the phone by Mr Ashiq at 1733 that the trade would be settled through Odeon. Although it was not suggested that Shooters Hill had authority, actual or apparent, to bind Odeon to a contract, Mr Ashiq knew that Odeon would be prepared to step in because this was the arrangement which had been operated on many occasions before; as Mr Van Alstyne put it in evidence "we had already done many transactions with Shooters Hill and it had become kind of perfunctory that our back office was able to issue trades that Shooters Hill was arranging." Mr Ashiq had checked on the Friday with Mr Nissim that Odeon could conclude a transaction with Molton Street as a counterparty for these Bonds.

89. Accordingly the position at 1712 was that neither Mr Rohailla nor Mr Ashiq thought or intended that Shooters Hill was contractually bound. They had every reason to believe that a concluded agreement would be made with Odeon as a result of the concluded negotiations with Shooters Hill, but Mr Rohailla appreciated that this was subject to confirmation by Odeon, who would not be bound unless and until he and Odeon expressed their assent to each other. No question of novation arises.

90. The contract between Molton Street and Odeon was concluded (subject to the effect of the Disclaimer) at 1758 when Mr Rohailla confirmed the purchase to Mr Nissim on Bloomberg and asked him to send the trade ticket. That was the moment of formation, although it was evidenced shortly thereafter by Mr Nissim sending the trade ticket at 1801 and Mr Rohailla thanking him for it at 1805.

Issue 2: Putative Proper Law

91. It is common ground that the putative proper law of the contract is to be determined by reference to Article 4 of Regulation (EC) No 593/2008 of The European Parliament and of The Council of 17 June 2008 on the law applicable to contractual obligations ("the Rome I Regulation"), which provides:

> "Applicable law in the absence of choice
>
> 1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:
>
> (a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
>
> 2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

> 3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply."

92. Odeon asserts that Article 4.1(a) applies. Molton Street takes issue with whether the Bonds are "goods" within the meaning of the subparagraph. Little time was devoted to this point, and it is not necessary to decide it, because Molton Street accepts that the characteristic performance of the contract is delivery of the Bonds by Odeon, whose habitual residence is in New York, such that New York law applies by application of Article 4.2 unless, as Molton Street contends, it is clear that the contract is manifestly more connected with England so as to come within Article 4.3, which is described in recital (20) of the Rome I Regulation as the "escape clause".

93. The Rome I Regulation replaces the Rome Convention 1980, which had introduced the innovative concept of a presumption in favour of the place of residence or business of the person effecting the performance which was characteristic of the contract (as to the source and rationale of the concept see *Dicey Morris & Collins The Conflict of Laws* 15th edn paragraphs 32-076, 077). Under the Rome Convention, the test in Article 4.1 (in the absence of choice of law) was the country with which the contract was most closely connected. Article 4.2 sets out presumptions expressed to be subject to Article 4.5, including the presumption in favour of the place of residence of the person effecting the performance which was characteristic of the contract. Article 4.5 provided that the presumptions should be disregarded if it appeared from the circumstances as a whole that the contract was more closely connected with another country. This was recognised as involving a balance between certainty and flexibility, which required the factors against the presumption to have a preponderance of weight which made it clear that the closest connection was with a country other than that of the residence of the person effecting characteristic performance: see e.g. ***Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd*** [2002] EWCA Civ 2019 [2012] CLC 533 at paragraph [41] and ***Intercontainer Interfrigo SC (ICF) v Balkenede Oosthuizen BV*** (Case C-133/08) [2010] QB 411 at paragraphs [59]-[64].

94. The text and architecture of Article 4 of the Rome I Regulation is very different from that of the Rome Convention. In particular, the test is no longer expressed as one of closest connection; the test is that contained in the rules set out in Articles 4.1 and 4.2, which are no longer expressed as presumptions or as being subject to the closest connection test; and the closest connection test has become an "escape clause" to be applied only where it is *clear* that the connection is *manifestly* closer to a country other than that dictated by the tests in Articles 4.1 and 4.2 so that they are to be disregarded. The word "clear" reflects what the ECJ had already said was the effect of Article 4.5 of the Rome Convention in the ***Interfrigo*** case, but the word "manifestly" suggests a more stringent standard than before, as does the elevation of the criteria in Articles 4.1 and 4.2 to tests from mere presumptions of closest connection. The new language and structure suggests a higher threshold, which requires that the cumulative weight of the factors connecting the contract to

another country must clearly and decisively outweigh the desideratum of certainty in applying the relevant test in Article 4.1 or 4.2.

95. Mr Atrill first submitted that if the Odeon/Molton Street contract was a novation of a contract between Molton Street and Shooters Hill, which would be governed by English law, that was a powerful factor in favour of English law. Since I have rejected the premise I do not need to consider this submission further.

96. On the footing that the contract with Odeon was not a novation Mr Atrill submitted that the following factors brought the contract within Article 4.3:

    (1) Odeon's role was relatively insignificant, the terms having been negotiated by Shooters Hill, with Odeon's involvement being "a matter of chance" because Shooters Hill was unable to contract as principal. All the "work" in negotiating the contract was done by Shooters Hill, which is reflected in the fact that it received 90% of the mark up and Odeon only 10%.

    (2) The contracts immediately up and down the chain were governed by English law because in each case the seller (City & Continental and Molton Street respectively) was based in London.

    (3) The place of delivery of the Bonds would be London rather than New York.

    (4) Molton Street is based in London and regulated by the FCA. It would be odd if Mr Rohailla's conduct in London, which is subject to English criminal law and English regulatory provisions, should simultaneously give rise to overlapping, but distinct, New York law civil and regulatory consequences.

97. I am unable to accept that these factors, singly or cumulatively, make it clear that the contract is manifestly more closely connected with England than New York so as to fulfil Article 4.3.

98. The starting point is that there are considerable connecting factors with New York, quite apart from that being Odeon's place of business. The Bonds themselves are closely connected with New York, and not with England. The Bonds are choses in action comprising a complicated bundle of rights set out in the prospectus, which defines how such rights are to be exercised and transferred. An analysis of those rights points to the conclusion that the Bonds are essentially New York instruments in which the primary rights they confer are against Bear Sterns Asset Backed Securities I Trust 2007 AQ ("BS Trust"), a New York common law trust, and/or The Depository Trust Company ("DTC"), a New York chartered limited purpose trust company, acting on its behalf. BS Trust is the issuing entity, which was a special purpose vehicle set up by Bear Sterns & Co Inc, a bank headquartered in New York. The rights conferred by the Bonds, as set out in the prospectus, primarily comprise (a) beneficial ownership in the pool of sub-prime mortgage loans secured by liens on residential properties which BS Trust has purchased from the original mortgagees through a chain (it is not clear whether these confer real property rights or merely personal rights against BS Trust); and (b) the rights to monthly distributions ("coupons") which are to be made by DTC on behalf of BS Trust.

99. On analysis it is also the case that performance of the contract between Molton Street and Odeon was to take place in New York. As to payment, the price was in US$ and was to be paid by Molton Street to Odeon through their respective settlement agents in New York for clearing purposes (ICBC and Pershing respectively).

100. As to delivery of the Bonds, the position is a little more complicated. The rights conferred by the Bonds are reflected in "certificates" which represent the obligations of BS Trust. There are no issued certificates in paper or electronic form which change hands. The certificates are issued to the subscribers in book entry form i.e. simply by registration, and transfers involve book entries only. At issue of the securities, subscribers may elect to hold their beneficial interests through DTC in New York, or Euroclear in Belgium (or Clearstream in Luxembourg which I can ignore for present purposes). Registrations of beneficial interests are made for those holding securities in the US by a book entry at DTC in New York. The entries are typically made by DTC in the names of participant brokerage firms, who in turn hold book entries for the beneficial owners. DTC is to record its nominee, Cede & Co as the single registered "security holder", but DTC itself records the beneficial ownership in its own books. For subscribers to the Bonds through Euroclear there is (a) registration in Euroclear's name at DTC as an omnibus entry for all Euroclear's customers holding beneficial interests (in fact indirectly via JP Morgan Chase Bank NA as the DTC participant, so that the DTC book entry is in JP Morgan's name and Euroclear has a book entry in its name at JP Morgan); and (b) registration as a book entry with Euroclear in the name of the beneficial owner (again typically in fact recorded at Euroclear in the name of a Euroclear brokerage participant which in turn records a book entry with the client's name).

101. The mechanism for payment and transfer of title where Bonds were sold by a DTC participant to a Euroclear participant was set out in the prospectus. So far as book entries were concerned it involved (1) the book entry at DTC being amended on the settlement date to delete the seller (if, as here, it was changing from a DTC participant to a Euroclear participant) and to enter JP Morgan Chase's name under Euroclear's omnibus arrangement; and (2) Euroclear recording the name of the buyer in its records as the new beneficial owner, typically by recording the name of the Euroclear participant which in turn recorded the name of the buyer. The prospectus recognises that this second step would or might occur the following day after settlement. Accordingly to complete a sale of the Bonds from Odeon to Molton Street, Odeon's title, reflected in a book entry at its DTC participant, and in an entry at DTC in the name of its DTC participant, would be deleted in those books and replaced at DTC with an entry in the name of JP Morgan Chase; and there would be a series of changes in book entries at JP Morgan Chase, Euroclear and the relevant Euroclear participant used by Molton Street which would result in a book entry in Molton Street's name with its Euroclear participant.

102. Mr Atrill contended that because a Euroclear buyer acquired no direct rights against DTC or BS Trust, but only rights against its Euroclear participant, who in turn could only enforce the rights attaching to the Bonds through a chain of requests to exercise rights via Euroclear, JP Morgan Chase and DTC, title is transferred where the Euroclear buyer acquires the book entry with its Euroclear

participant; and that that is therefore the place of performance of a contract for sale of the Bonds to a client of a Euroclear participant. Accordingly, he submitted, transfer of title would occur where the entry would be made in the books of Molton Street's participant which he said was in England.

103. This is not a sound contention. If transfer is looked at by reference to the rights of Odeon and Molton Street against their immediate contractual counterparties, through which instructions could be given to exercise the substantive rights conferred by the Bonds, there is no single transfer between the two: Odeon would divest itself of such rights with the amendment of the entry in the books of its US participant in DTC and the deletion of that participant's name in the book entry at DTC; Molton Street would not acquire them until creation of the book entry at the Euroclear participant. If transfer of title is looked at in this sense, it involves a series of steps only one of which occurs in England if the Euroclear participant's client is English. However for the purposes of seeking to identify the place of delivery in performance of the contract of sale, it is necessary to look at the substantive rights attaching to the Bonds, not the local arrangements by which the beneficial owner of the rights may give instructions for the exercise of those rights. The substantive rights attaching to the Bonds are represented by the book entry at DTC in New York. It would be when that changed, in New York, that Odeon's interest in the substantive rights would be extinguished and there would be an effective acquisition of such rights by Molton Street, albeit that it would require JP Morgan Chase to implement their exercise through a chain of instructions via Euroclear.

104. I have dealt with this question in a little detail because it arises again in the context of an issue as to the extraterritorial application of the 1934 Act. What matters for the purposes of the proper law issue is that in both a legal and commercial sense this was a contract of sale of New York securities whose performance on both sides, both payment and delivery, was to take place in New York.

105. Turning to the four factors relied on by Mr Atrill as demonstrating closest connection with England:

(1) Odeon's role was not, as he submitted, relatively insignificant and was not a matter of chance. It was always contemplated by Molton Street and Shooters Hill when the contract was being negotiated that Odeon would be Molton Street's counterparty, and therefore it was, or at least ought to have been, contemplated that Odeon would ultimately have a discretion whether to decide to be bound, since Shooters Hill did not have authority to contract on its behalf. The role of principal contracting party is a significant one as everyone involved must have appreciated. It involves assuming counterparty risk, which is why regulatory authorities impose capital requirements, which Shooters Hill was unable to fulfil. The fact that negotiations took place between exclusively English parties carries little weight when they were conducted on the understanding that the contract would be with a US party, and against the background that it ought to have been contemplated that the US party would itself have to decide whether to give its independent assent by adopting the outcome of those negotiations.

(2) As to the upstream and downstream contracts being governed by English law, Mr Atrill referred to *Haeger & Schmidt GmbH v MMA IARD* [2015] QB 319 in which the European Court of Justice said at paragraph [49] "significant connecting factors to be taken into account include the presence of a close connection between the contract in question with another contract or contracts which are, as the case may be, part of the same chain of contracts, and the place of delivery of the goods." Mr Atrill also relied on cases concerned with networks of contracts involving letters of credit, insurance and reinsurance contracts and guarantees, referring compendiously to the cases identified by Blair J at paragraph [34] of his judgment in ***British Arab Commercial Bank Plc v Bank of Communication*** [2011] EWHC 281 (Comm); [2011] 1 Lloyd's Rep. 664. None of those cases involved a chain of contracts of sale, which raise different considerations. Moreover they were all cases on the Rome Convention 1980 and for the reasons I have endeavoured to explain, decisions on the Rome Convention must be used with caution in view of the difference in approach and language of the Rome 1 Regulation, as the editors of *Dicey Morris & Collins* observe at paragraph 32-079. It would no doubt be generally conducive to commercial coherence that in a chain of contracts for purchase and sale of goods or securities on back to back terms, the same proper law should govern each contract. That may be promoted or impeded by express or implied choice of law in individual contracts. But leaving aside considerations of choice of law, there is a conceptual difficulty of where to start if the quest is to seek to achieve a single system of law governing all contracts in the chain. Contracts in the chain may have sellers resident in a number of different jurisdictions with such contracts not having even the slightest connection with countries with which other contracts in the chain have their closest connection. It would not be conducive to the general desirability that all contracts should be governed by the same law to treat the Odeon/Molton Street contract as most closely connected with England if others in the chain had no English party or connection; nor to treat it as so because City & Continental was an English seller, when the seller to City & Continental may have been based in New York or indeed any other financial centre which trades in junk bonds; and its seller might have been based in the same jurisdiction with the result that their contract overwhelmingly had its closest connection with the place of business of both parties, as it surely would if they were both based in New York. Indeed if taken to its logical conclusion, Mr Atrill's argument would involve all the contracts being governed by New York law, not English law, because that would be the proper law of the contract at the beginning of the chain, being a sale by Tilden Park whose business is in New York (assuming, which raises a further complication, that one were applying English conflicts rules). Accordingly the proper law of the contracts above and below the Odeon/Molton Street contract is not a strong connecting factor to the proper law of that contract, at least where the proper law of those other contracts is based on the location of the seller or closest connection of those contracts with England (different considerations might apply in the case of an express choice of law known to the parties).

(3) Contrary to Mr Atrill's third point, I have concluded that the place of delivery of the Bonds was New York rather than London.

(4) The fact that Molton Street is based in London, regulated by the FCA and subject to English criminal law, is neutral. Odeon is based in New York and regulated by the SEC and FINRA and subject to New York criminal law. Different conflicts of law principles apply to criminal and civil obligations, and indeed to different kinds of civil obligation. The fact that conduct of one party inducing a contract may be criminal conduct under English law has no necessary bearing on the proper law of the contract.

106. Accordingly the putative proper law of the contract is the law of New York. I heard expert evidence on New York law from Professor Karmel on behalf of Odeon, and Mr Gelber on behalf of Molton Street. Both were well qualified in their different ways and they covered a great deal of ground on a large number of issues in a commendably succinct manner, both in their reports and also in their oral evidence. It was not possible to explore many of the issues in depth during the hearing. Where they differed I have been guided by the cogency of their views and the underlying materials with which they were supported, recognising that the constraints of conducting the trial proportionately did not always afford them a sufficient opportunity to expound their views as fully as the issues might have deserved.

Issue 3: The Disclaimer

107. The critical words of the Disclaimer are "…***trades cannot be considered 'good trades' without express consent of the Principals of the firms.***"

108. Mr Rohailla accepted in cross-examination that he understood from his own FINRA training that the person responsible to FINRA for supervision of a firm would have been known as a Principal. Odeon's website identified its Principals as being Mr Schwartzberg and Mr Van Alstyne.

109. Mr Patton submitted that the effect of the Disclaimer was to make express consent by Mr Schwartzberg and/or Mr Van Alstyne a condition precedent to a binding contract coming into existence; and since there was no such consent, there was no concluded contract. It was not necessary to decide whether approval by one of the two would suffice because neither had done so in this case.

110. The experts agreed in their joint memorandum that "A party may impose a condition on the circumstances under which it enters into a contract. In such cases, offer or acceptance is made subject to the fulfilment of the condition and there is understood to be a condition precedent to the formation of the contract. A condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises." This reflected the two different forms of condition precedent recognised by the New York Court of Appeals in *Oppenheimer & Co Inc v Oppenheim, Appel, Dixon & Co* 86 N.Y.2d 685, 691, one being "a condition precedent to the formation or existence of the contract itself", and the other "acts or events which must occur before a party is obliged to perform a promise made pursuant to an existing contract". The Court of Appeals held that where there is a condition precedent to the formation of a contract, no contract arises "unless and until the condition occurs"; and described words such as "if", and "unless and until" in the contract before it as "unambiguously" establishing an express

condition precedent, because they had employed "the unmistakable language of condition".

111. Mr Atrill submitted that the Disclaimer was no bar to the conclusion of a contract for one or more of four reasons:

(1) As a matter of construction the provision was impermissibly vague and meaningless.

(2) As a matter of construction the Disclaimer only applies to Bloomberg messages and has no application to a contract concluded by trade tickets.

(3) As a matter of construction the Disclaimer required Odeon to disavow the contract within a reasonable time, which had expired before the cancellation on 18 June 2014.

(4) Odeon waived reliance on the Disclaimer.

112. Odeon accepted that there was at least one aspect in which the provision was not intended to take effect in accordance with its terms, namely the requirement for approval by the Principals of the firm**s** (plural). Mr Schwartzberg accepted that non US counterparties such as Molton Street might not have readily identifiable Principals; and that in any event he would not expect consent to be required from the Principals of a large US bank. Mr Patton submitted that the provision should be read down as referring only to consent by Odeon. I inquired during the course of Mr Atrill's closing submissions whether he was relying on a point that the parties had not intended the provision to have legally binding effect, an analysis which he adopted with only moderate enthusiasm. However the point had not been pleaded or addressed as a matter of New York law in the experts' reports; it was only raised briefly by me with Mr Gelber in oral evidence in a different context, and was not raised at all with Professor Karmel. I accept Mr Patton's submission that since New York law on intention to be bound in this context had not been explored, this was not a point open to Molton Street. Accordingly Molton Street's points all arise as a matter of construction/implication, to which New York law applies, apart from the waiver argument. It was agreed between the parties that the waiver argument should be resolved applying English law.

113. There was relatively little dispute about the principles of construction and implication under New York law. So far as relevant they are broadly the same as those in English law subject to the following:

(1) Extrinsic evidence does not become available as an aid to construction unless the words are ambiguous; if the language of a contract is clear and unambiguous, courts will interpret the plain meaning, including any clear and unambiguous express terms, within the four corners of the document. Ambiguity exists where "a reasonably intelligent person viewing the contract objectively could interpret the language in more than one way": *Two Locks Inc v Kellogg Sale Co* 68 F Supp.3d 317 at [13][14][15] The determination of whether ambiguity exists involves considering the entire contract: *ibid* at [17]. Mr Atrill submitted that it is unclear exactly what information that "reasonably intelligent person" is assumed to have about the context for the transaction;

that it makes little sense to give that hypothetical person no context – words have no meaning without context; and that evidence of market practice and background should be available for this purpose, as it would be under English law, in the absence of a clear contrary indication in the New York case law before the court. Mr Patton submitted that resort to anything outside the four corners of the document was impermissible, relying on *Ashwood Capital Inc. v OTG Management Inc.* (2012) 99 A.D.3d 1 at [5]: "Whether a contractual term is ambiguous must be determined by the court as a matter of law, looking solely to the plain language used by the parties within the four corners of the contract to discern its meaning and not to extrinsic sources". A District Court decision referred to in Mr Gelber's report, *Deen v New School University No 05* Civ 7174 (KMW), 2007 WL 1032295 refers at paragraph *4 with apparent approval to *Alexander v Alexander* 136 F.3d at 86 (which was not independently cited by either expert) as "noting that contract ambiguity can arise "either from the language itself or from inferences that can be drawn from this language"". In contrast to the English law approach which favours resort to all context which would reasonably have been available to the parties as a guide to meaning, it appears that the effect of New York law is that in determining ambiguity the context cannot stray from the language of the four corners of the contract and its subject matter, together with inferences from such language, providing a bright line rule which at least excludes evidence of market practice being admitted for the purpose of this exercise. In this case ambiguity must be determined by looking at the terms of the Disclaimer, and the documents in which it is contained and incorporated (the Bloomberg exchanges and the trade ticket), in the immediate context of the subject matter of the putative contract. Beyond that it is not permissible to go when determining whether the ambiguity gateway is opened for the purposes of admitting extrinsic evidence.

(2) Admissible extrinsic evidence can include the conduct of the parties after conclusion of the contract.

(3) There was some debate about the applicability of the contra proferentem rule and whether it was a tool of construction of last resort. I conclude that it is not a rule applicable where a contract is entered into between sophisticated parties of equal bargaining power (preferring Professor Karmel's evidence on this point) so that it plays no part in this case.

(4) As under English law, a New York court will strive to avoid finding that a contractual provision is meaningless or too vague to enforce. It would only do so as a last resort where any attempt to give meaning was futile.

(5) As to the implication of terms, the task of the court in deciding whether to imply terms into a contract is to determine what the parties would have intended if they had explicitly considered the issue: *Great Lakes Transit Corp. v Marceau* 154 F2d 623, 628.

Ambiguity

114. Mr Atrill's submissions on ambiguity took as their point of departure the evidence of Odeon's witnesses, which he submitted varied as to what the

disclaimer entitled it to do, and when, and on what grounds. For example, he submitted, Mr Schwartzberg seemed to regard it as a unilateral power of withdrawal which could only be exercised in a commercially reasonable manner. This is not a legitimate factor to pray in aid on the issue of ambiguity: it is the very kind of extrinsic evidence which is sought to be introduced as an aid to construction if the gateway of ambiguity opens it to admission, not an ambiguity to be found within the four corners of the contractual documentation.

115. Mr Atrill relied on the following factors as establishing ambiguity. First he submitted that Odeon's construction conflicted with the terms and nature of the trade ticket. There were a number of strands to the argument:

(1) It was said that Odeon's construction rendered the whole trade ticket superfluous because it was a confirmation. This is not so. If, in the absence of a contrary intention expressed in a disclaimer, contract formation takes place by acceptance of firm bids/offers, and the trade ticket is merely evidence of such fact, collecting the contract terms into a single document, there is nothing inconsistent with the nature of a trade ticket in it repeating a conditionality which was already part of what was agreed in the bid/offer acceptance process. If the transaction is subject to a condition precedent to its formation because of the inclusion of the Disclaimer at that stage, there is nothing inconsistent with the nature of the trade ticket that the condition precedent should be repeated. On the contrary, the trade ticket is fulfilling its function of recording the terms agreed, including the condition precedent to contract formation. It is for the parties to determine when they intend to be bound.

(2) It was said that Odeon's construction conflicted with the unqualified language in the trade ticket "*Odeon sells to Molton - thanks*". I see no such conflict. This argument proceeds on the unpromising premise that any conditionality in the language of the Disclaimer is meaningless such that the court should give up as futile an attempt to give any meaning to the relevant words; and ignores the imperative in New York law to assess ambiguity by looking at all parts of the document. A document which in one part identifies a sale and in another identifies that it is subject to Principal consent contains no ambiguity. The two parts can properly be read together, and indeed must be if the court is to look at the whole document and seek to avoid treating any part of the language as meaningless.

(3) It was said that the settlement date (implicit in the terms contained in the contractual exchanges as a matter of normal market practice in the absence of contrary agreement, and explicit in the trade ticket) can only be achieved if the agreement is binding on the date concluded. This is not apparent from the documentation itself and so is not an ambiguity which arises on the document. Nor is it necessarily so. There will be at least two days between trade and settlement within which the counterparty can secure certainty over whether Principal consent is given, following which he will still be in a position to settle if consent is given. If he chooses to conclude an unconditional matching trade without waiting for consent, he runs the risk that if consent is not forthcoming he will be unable to fulfil it. That is simply the consequence of the Disclaimer, not a basis for ambiguity.

(4) A related point was that the Disclaimer uses superfluous language which is inapplicable to at least some of the circumstances in which it is used. For example the reference to bids being indicative only is inapplicable to a trade ticket; and it appears that the Disclaimer is included in internal Odeon communications, to which its language is inapposite. This is not relevant to the issue being considered, which is whether the wording requiring consent of Principals is ambiguous when used between negotiating parties in a written bid/offer exchange or a trade ticket.

116. Second, Mr Atrill submitted that a condition precedent of Principal consent was inconsistent with the phrase "offers are not Firm (sic) unless so indicated", because it suggested that if an offer is stated to be a firm offer, it is capable of acceptance so as to give rise to a binding agreement. I detect no inconsistency: an offer which is not clearly designated as a firm offer is not capable of being accepted so as potentially to give rise to a contract; but any offer so made and accepted is still subject to satisfaction of the condition precedent before becoming legally binding.

117. Third, Mr Atrill submitted that the reference to "good trades" is inherently ambiguous in two respects, in that it might not prevent an agreement becoming binding but merely (1) confer a unilateral right of withdrawal without consequence and/or (2) confine such unilateral right of withdrawal to cases which in Mr Schwartzberg's words were not "legitimate" in a "market context". I see no ambiguity in the document itself in either of these respects. The reference to "good trades" is plainly a reference to whether Odeon is to be legally bound to fulfil the purported trade, i.e. whether it is to be legally binding. The subjectivity is to consent being given. A transaction is not a good trade "without" such consent, i.e. unless and until such consent is given. The language is not that of a condition subsequent, in which the trades would be considered good trades unless and until disavowed by notification of a refusal of consent. That would involve the proposition that they *were* good trades for a period of time *without* the consent of the Principals, contrary to the clear language of the clause. A decision of the New York Appellate Division in *Azimut-Benetti SPA v Magnum Marine Corporation* 55 AD 3d 483 is in point. The plaintiffs sought to enforce a preliminary contract by which the parties bound themselves to sign a final contract and execute a sale of assets within 90 days. The defendant, when signing, added by hand, "Agreed to in principal [sic] subject to approval by my attorney". The Appellate Division held that the defendant's attorney's approval of the preliminary contract was a condition precedent to the formation of a binding contract, which had never been given. In giving summary judgment, it rejected an argument by the plaintiff that the subjectivity was fulfilled because "there was never any clear indication [from the defendant's attorney] that said approval was withheld". The wording in that case (that a contract would only be entered into "subject to approval") is not materially different as a matter of plain language to the wording in the current case (that no binding contract shall exist "without …consent").

118. Fourth, Mr Atrill submitted that there is an ambiguity in what is meant by "express" consent, and in particular whether it is sufficient if it is expressed internally or whether it has to be expressed to the counterparty. Mr Patton contended that the word was merely used for emphasis, and all that was required

was real consent, whether or not communicated to the counterparty. The word is clearly capable of meaning that consent must be expressed to the counterparty. This is indeed an ambiguity, but it is not a relevant one. The ambiguity would allow extrinsic evidence on the question of how the consent had to be expressed for the purposes of resolving such a dispute in a case in which it arose. But in this case it is common ground that no consent was given by Mr Schwartzberg or Mr Van Alstyne of any kind, internally or externally. In order to pass the gateway of ambiguity under New York law so as to admit extrinsic evidence as an aid to construction, the ambiguity must be in the aspect of meaning which is in dispute, and the aspect of meaning for which it is sought to pray in aid the extrinsic evidence as being of assistance. Accordingly an ambiguity as to the form of consent cannot open the gateway to extrinsic evidence on whether the provision is a condition precedent unless it creates ambiguity on that latter question on the face of the document, which in my view it cannot: whether consent is required as a condition precedent depends on the meaning of words other than "express", namely "not considered "good trades" without ….consent"; those other words do not change their plain meaning dependent on whether "express" connotes internal or external communication.

119. Fifth, Mr Atrill submitted that the wording was ambiguous as to who had to provide the consent. On Odeon's side, was it one or both of the Principals? On the counterparty side, who are the "Principals" for non US entities? Again, whilst these are ambiguities, they are not relevant ambiguities which open the gateway to extrinsic evidence on what is meant by the critical words "not considered "good trades" without express consent". If those words plainly import a condition precedent of consent from Principals, as I believe they do, it would simply be a matter for construction in a case in which it mattered as to whose consent was required. It does not matter in this case because on even the narrowest construction, the words require consent from one of Odeon's principals, which was not given in this case.

120. Sixth, Mr Atrill identified an ambiguity in whether there was any restriction on the grounds on which approval could be refused, whether for example it was limited to reasonable grounds. This point really depends on the earlier argument that there is an ambiguity as to whether the wording imports a condition subsequent requiring disavowal of consent. If it plainly means that consent is a condition precedent, as I believe it does, there is no room for importing any requirement for grounds of refusal. The argument would amount to implying words such as "such consent not to be unreasonably withheld" which are not there.

121. I conclude that applying New York law there is no ambiguity in the words, looking only at the documents in which they are contained and incorporated in their immediate context and the inferences which can be drawn from such language. They import a condition precedent of prior consent from Odeon's Principals, without which there is no binding contract. As a matter of law no extrinsic evidence is admissible as an aid to construction on this question.

122. Accordingly Mr Atrill's three construction points are to be rejected:

(1) The term is not impermissibly vague so as to be meaningless. It is clearly and unambiguously a condition precedent.

(2) The term is not inapplicable to a trade ticket. If, as I have held (and as Molton Street submitted) a contract would be concluded in the absence of the Disclaimer by an acceptance of a firm bid or offer prior to exchange of trade tickets, its inclusion in a trade ticket, whose primary purpose is evidential rather than contractual, is entirely appropriate to make clear that the trade ticket is not intended to supersede what is already a legally effective condition precedent to the conclusion of a contract. Its inclusion in the trade ticket fulfils the function of the trade ticket which is to evidence the terms already agreed, which were themselves subject to the condition precedent in the Disclaimer.

(3) The term does not require Odeon to disavow the contract within a reasonable time. It requires consent as a condition precedent, without which there is never a binding contract. In New York law, as in English law, where a contract does not fix a time for the performance of a contractual obligation, the law usually implies that it shall be performed within a reasonable time. However, the error in Molton Street's argument is that the Disclaimer does not purport to impose an obligation on Odeon to obtain the consent of its Principals: on the contrary, it renders the existence of a binding contract subject to such consent. There is, accordingly, no justification for implying a "reasonable time" limitation. The Disclaimer makes perfect sense without it: unless and until consent is provided, there simply is no binding contract. It is notable that, in the *Azimut-Benetti* case the Appellate Division did not consider that any question arose of implying a term that the defendant's attorney's approval should have been given within a reasonable time of signature of the preliminary contract.

Waiver

123. Molton Street relies both on a prospective waiver arising from earlier conduct, and on waiver by conduct in relation to this transaction. The species of waiver being invoked is presumably a waiver by estoppel, there being no question of an election by Odeon in this context. In ***Steria Ltd v Hutchison*** [2006] EWCA Civ 1551, [2007] ICR 445 Neuberger LJ, as he then was, said at paragraphs [93]-[94]:

> "93. When it comes to estoppel by representation or promissory estoppel, it seems to me very unlikely that a claimant would be able to satisfy the test of unconscionability unless he could also satisfy the three classic requirements. They are (a) a clear representation or promise made by the defendant upon which it is reasonably foreseeable that the claimant will act, (b) an act on the part of the claimant which was reasonably taken in reliance upon the representation or promise, and (c) after the act has been taken, the claimant being able to show that he will suffer detriment if the defendant is not held to the representation or promise. Even this formulation is relatively broad brush, and it should be emphasised that there are many qualifications or refinements which can be made to it.
>
> 94. The requirement for these three features, at least in relation to estoppel by representation, was very clearly put by the Privy

> Council in *Tai Hing Cotton Mill Ltd –v- Liu Chong Hing Bank* [1986] AC 80 at 110, in the following terms: 'the essence of estoppel is a representation (express or implied) intended to induce the person to whom it is made to adopt a course of conduct which results in detriment or loss…"

124. As to conduct in prior transactions, Mr Atrill submitted that there was a practice of not requiring Principal approval in the previous trades between Molton Street and Odeon. However 9 of the 11 previous transactions between Mr Rohailla and Odeon preceded June 2013 which is when, on the unchallenged evidence of Mr Van Alstyne, Odeon started using the Disclaimer. Such transactions cannot, therefore, give rise to any waiver. The other two transactions, which post-dated the introduction of the Disclaimer, were negotiated, on Odeon's side, by Mr Tesmond. It is probable that Mr Schwartzberg would have been aware of those trades and given his approval before they were concluded. The absence of any external discussion of Principal approval on those two occasions cannot amount to a clear and unequivocal representation that Odeon would not seek to rely on the Disclaimer in a subsequent trade, especially where that subsequent trade took place through a different individual, Mr Nissim. There is no evidence that Mr Rohailla relied in any way upon any such representation. There is nothing in such previous dealing which would make it unconscionable for Odeon to rely on the terms of the Disclaimer in this case.

125. As to conduct in relation to this transaction, Mr Atrill submitted that the unqualified terms of the Bloomberg messages and/or the nature of a trade ticket impliedly represented that such approval is not required. In the light of the fact that both bore the Disclaimer this argument is untenable. The requirement of prior Principal consent is not inconsistent with the nature of a trade ticket which states that requirement on its face. Similarly unsound is Mr Atrill's alternative argument that when Odeon decided to withdraw, it elected to purport to "cancel" the trade – and thus, it is said, to waive its right to choose not to approve the transaction in the first place by choosing to take its stand on the grounds specified in the cancellation notice instead, namely that the Bonds would not be delivered. To treat a cancellation as a representation of consent to the transaction being considered a good trade seems to me a contradiction in terms, and it is in any event difficult to see how Molton Street could have relied on it so as to make Odeon's reliance on the Disclaimer unconscionable.

126. Last Mr Atrill relied on the issue of a confirmation of the trade by Pershing, Odeon's settlement agent. The document bears an issue date of 16 June 2014 and is addressed to ICBC, Molton Street's settlement agent in New York. There was no direct evidence as to what happened to the document, but in the normal course it would have been sent by Pershing to ICBC for the purposes of settlement. I will assume that it was issued on 16 June 2014 and sent to ICBC shortly thereafter and in any event before cancellation on the 18 June. There was no direct evidence of how the document was generated but I infer that it was the result of back office instructions from Mr Nissim, whose evidence was that it would have been issued at Odeon's request. However there is no evidence that this was ever seen by Molton Street at the time, or relied upon in any way as a representation that Odeon

regarded the contract as unconditionally binding. There is no evidence that it was acted on at any time before cancellation on 18 June 2014. Nor is there any basis for holding that it would be unconscionable for Odeon to be allowed to rely on the Disclaimer by reason of the production or sending of that document. That is fatal to the argument that it involved a waiver of the Disclaimer.

127. In conclusion, Odeon's case on the effect of the Disclaimer succeeds. That is a complete answer to Molton Street's claim, and the remaining issues do not arise. I will nevertheless address them, assuming for such purposes that there was a concluded contract, but I can do so more briefly than I would have done had they been dispositive of the outcome.

Issue 4: Contravention of the 1934 Act

The alleged contravention

128. When considering this limb of Odeon's defence it is important to keep in mind throughout that it is not based on any dishonesty by Mr Rohailla in relation to what he said to Mr Rhodes or Mr Ashiq about the prices being indicated or bid and offered up or down the line. It is an allegation of a fraudulent deception practiced directly on Odeon by a non disclosure by Mr Rohailla. Specifically what is said to have been fraudulently withheld by Mr Rohailla from Odeon in breach of the 1934 Act is:

(1) The concerns expressed by Mr Agresta about City & Continental's ability to deliver the Bonds. This is a reference to the conversation with Mr Ashiq at 1729 in which Mr Ashiq explained that he had had an email from the seller's side saying wait for an email confirmation (which may have been a reference to the "[not] done yet" email at 1718 which Mr Rohailla did not see); and to the three way conversation at 1733 during which Mr Agresta said "we have been told by the seller that the trade has not been confirmed…" and asked for Mr Rohailla's help saying that "you need to say to the guy [i.e. Mr Rohailla's buyer] that the trade has not been confirmed."

(2) Mr Rohailla's reckless lie to Mr Ashiq, after Mr Agresta had dropped off the 1733 conversation, that Morgan Stanley had already sold on the Bonds, intended, so Odeon submits, to encourage City & Continental to confirm the transaction.

The provisions of the 1934 Act

129. Section 9(a)(4) of the 1934 Act provides:

> "(a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—
>
> (4) If a dealer, broker, security-based swap dealer, major security-based swap participant, or other person selling or offering for sale or purchasing or offering to purchase the

> security, a security based swap, or security-based swap agreement with respect to such security, to make, regarding any security other than a government security, any security not so registered, any security-based swap, or any security-based swap agreement with respect to such security, for the purpose of inducing the purchase or sale of such security, such security-based swap, or such security-based swap agreement any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which that person knew or had reasonable ground to believe was so false or misleading."

130. Section 10(b) provides that it shall be unlawful:

> "To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as [the SEC] may prescribe as necessary or appropriate in the public interest or for the protection of the public interest or for the protection of investors."

131. The relevant rule made by the SEC in the present case is Rule 10b-5, which provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> (a) to employ any device, scheme, or artifice to defraud;
>
> (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, not misleading; or
>
> (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

132. Section 29(b) of the 1934 Act provides:

> "Every contract made in violation of any provision of this title or of any rule or regulation thereunder, and every contract . . . heretofore or hereafter made the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or

> regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule or regulation . . ."

133. There was a broad measure of common ground between the experts on the meaning and effect of the relevant provisions of the 1934 Act:

(1) A violation requires at least the following elements: (a) a misstatement or omission, (b) of material fact, (c) made with a wrongful state of mind known as "scienter" and (d) in connection with, or to induce, the purchase or sale of a security.

(2) Where, as in the present case, the violation is said to consist of an omission, there must be a duty to speak. Although s. 9(a)(4) refers to making false statements, it also applies to omissions where there is a duty to speak, in a similar way to Rule 10b-5.

(3) The test for materiality is whether there was a "substantial likelihood" that its disclosure "would have been viewed by the reasonable investor as having altered the total mix of information made available": *Matrixx Initiatives Inc v Siracusano* 131 S.Ct 1309. As Mr Gelber emphasised, there is no duty to disclose "a mere speculative possibility" (*Pennsylvania Public School Employees' Retirement System v Bank of America Corporation* 874 F Supp.2d 341 341 at 351), which as Professor Karmel observed, is no more than an aspect of the requirement that the misstatement/omission must be of facts which are material facts.

(4) "Scienter" is a mental state embracing an intent to deceive, manipulate or defraud and requires at least reckless behaviour, which is defined as an extreme departure from the standards of ordinary care such that the danger is either known to the party or so obvious that he must have been aware of it. Mere negligence is insufficient.

(5) Although s. 29(b) itself suggests that a contract made in breach of the 1934 Act, or the rules made thereunder, is void ab initio, this provision has been interpreted by the courts as meaning "voidable at the option of the innocent party": *Berckeley Investment Group Ltd v Colkitt* 455 F 3d 195 (2006) at 205. Where a contract is induced by a misstatement or omission which involves a violation of the 1934 Act, the contract is voidable under s. 29(b) even though the contract itself could be performed perfectly lawfully.

134. The following issues of New York law in relation to the 1934 Act were in dispute:

(1) whether the transaction in this case falls within the territorial scope of the 1934 Act;

(2) whether Molton Street had a duty to speak; and

(3) whether, in order to obtain rescission, Odeon must prove that it reasonably relied on Molton Street's omission.

Extraterritoriality

135. The issue is governed by the decision of the US Supreme Court in *Morrison v National Australia Bank* 561 US 247 (2010), as developed by the Second Circuit in *Absolute Activist Value Master Fund Ltd v Ficeto* 677 F.3d 60, where the courts held that the 1934 Act would only apply to transactions on US exchanges or to "domestic transactions", i.e. (a) where the parties incurred within the US an irrevocable contractual liability to deliver or purchase the securities and/or (b) where title to the securities would pass within the US. Fulfilment of either limb is sufficient to render a transaction domestic.

136. I conclude that this was a domestic transaction fulfilling each of the alternative limbs of the test. Under New York law a contract concluded by electronic means is concluded at the place of receipt. The contract between Molton Street and Odeon was concluded (ignoring the effect of the Disclaimer) at 1758 when Mr Rohailla confirmed the purchase to Mr Nissim on Bloomberg and asked him to send the trade ticket. That message was received in New York. I prefer Professor Karmel's evidence, that there is a simple mechanistic test for these purposes, to that of Mr Gelber, who argued for the relevance of other factors such as the place of solicitation and negotiations. Moreover transfer of title in the Bonds would occur with the change to the book entry at DTC in New York. Although transfer of title involves a series of changes in the right to give instructions for the exercise of the substantive rights represented by the Bonds, occurring in New York for Odeon when its entry is deleted its DTC's participant's books and in DTC's books, and in Europe for Molton Street when the book entry is made at its Euroclear participant, what matters for these purposes, as for identifying the place of delivery for proper law issues, is the transfer of the substantive rights in the Bonds which occurs with the change in the book entry at DTC in New York. This was the view of Professor Karmel which I accept.

137. There is a further potential issue. In *Parkcentral Global Hub Ltd v Porsche Automobile Holdings* SE 763 F.3d 198, the Second Circuit has held that being a domestic transaction is merely a necessary, but not sufficient, condition to the territorial application of the Act. In that case the 1934 Act was held not to apply because "the claims in this case are so predominantly foreign as to be impermissibly extraterritorial". An important aspect of the reasoning was the prospect of incompatibility with foreign regulation, which was referred to in various parts of the judgment with different degrees of probability such as "inevitably" "obvious", "likely" and "potential". There was disagreement between the experts as to the scope of the *Parkcentral* exception, which was an extreme case on its facts and included actual regulatory overlap because there were claims pending in the German Courts and fraud investigations under way by the German authorities. The dispute about the scope of the exception, and as to whether there needed to be actual conflict between the regulatory regimes or merely the potential for conflict, narrowed somewhat in the course of evidence, in which both experts fairly and properly gave ground. My conclusion is that incompatible regulatory exposure is not a separate criterion but rather that the

probability and extent of actual or potential conflict is a factor in applying the ultimate test which is whether the facts are so predominantly foreign as to make the extraterritorial application of the Act impermissible. This is against the background that the relatively straightforward domestic transaction test laid down in *Morrison* was intended to provide simplicity and certainty, such that derogation requires *predominantly* foreign connections. In *Morrison* Justice Scalia said that the true focus of the 1934 Act is "not upon the place where the deception originated but upon purchases and sales of securities in the United States". *Parkcentral* includes the following passage:

> "In concluding that these complaints do not state a claim upon which relief may be granted, we do not suggest that the presence of some foreign element in a transaction necessarily means that Congress did not include it in the coverage of §10(b). To borrow Morrison's metaphor as to the effect of a minor domestic element on the nature of an overwhelmingly foreign transaction: Section 10(b) would indeed be a craven watchdog against securities fraud if it retreated to its kennel whenever a fraud involved some foreign activity. The potential for incompatibility between US and foreign law is just one form of evidence that a particular application of a statute is extraterritorial. It is neither a safe harbor nor the only relevant consideration in the extraterritoriality analysis. It predominates in this case because of the dominance of the foreign elements we have outlined above." [emphasis in original]

138. This case does not have predominantly non US connections so as to come within the *Parkcentral* exception. Odeon is a member of FINRA and subject to FINRA regulation. The securities are in substance New York instruments, denominated in US dollars, and the contract is governed by New York law. It fell to be performed, both as to payment and delivery, in New York. The fact that Mr Rohailla was based in England, and conducted negotiations with Shooters Hill here, of course raises the potential for conflicting and incompatible regulatory liability, but there were also discussions between him and Odeon, the latter in New York, which, although briefer than the negotiations with Shooters Hill, were necessary for the conclusion of a contract between those parties. Ultimately the 1934 Act is being invoked by Odeon as applying to a non disclosure to Odeon at the moment of contracting. That is conduct which has no greater geographical connection with London than New York. If the domestic transaction test were to be disapplied in this case it would be on the basis of little more than the fact that some negotiation of the contract which preceded the relevant allegedly fraudulent activity took place outside the US. That would not be not consistent with *Morrison* or *Absolute Activist*, nor justified by the facts or the reasoning in *Parkcentral*.

Duty to speak

139. Mr Gelber's evidence was that a relevant duty to speak arises only where there is a fiduciary duty owed by the silent party to the other, or where the non disclosure renders some other statement misleading. Neither is alleged by Odeon in this

case. Professor Karmel, on the other hand, opined that a duty to speak may arise under the "special facts doctrine" which requires disclosure where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair.

140. On this issue I prefer the evidence of Mr Gelber, which is supported by the US Supreme Court decision in *Vincent F Chiarella v US* (1980) 100 SCt 1108: see in particular both paragraph 15 and note 10 in the opinion of Justice Powell. Professor Karmel opined that it was a matter for New York State law, which recognised the special facts doctrine, relying on a passage in the judgment of the Court of Appeals for the Seventh Circuit in *James S Jordan v Duff and Phelps Inc* (1987) 815 F.2d 429 at 436: "The obligation to break silence is itself based on state law, see *Dirks*, *Chiarella*, and *Barker*, and so may be redefined to the extent state law permits." The passage which immediately follows, however, suggests that the reference to redefinition as permitted by state law was intended to be a reference to the ability of the parties to modify the obligation by contractual terms. The citation of *Chiarella*, which was itself a New York State law case, suggests that the passage relied on was not intended to suggest that New York State law can redefine the scope of the duty to speak in section 10(b) cases.

Reliance

141. On this issue I prefer the opinion of Professor Karmel that where the court is concerned with rescission, rather than damages, there is no need to prove reliance. It is supported by two successive decisions of the Court of Appeals for the Third Circuit in *GFL Advantage Fund v Colkitt* 272 F.3d 189 and *Berckeley Investment Group Ltd v Colkitt* 455 F.3d 195. Mr Gelber opined that there was simply a rebuttable presumption of reliance, but this is not consistent with the language used in *Berckeley* at 208: "A section 29(b) rescission claim based on a Section 10(b) violation, however, differs from a private damages action brought under Section 10(b). In the Section 29(b) context, a plaintiff seeking rescission does not have to establish reliance and causation"; nor with the rationale explained in *GFL Advantage Fund* at note 6: "Although maintaining a private right of action under Section 10(b) requires a plaintiff to prove reliance and damages (usually reflected in the stock's price movement), Section 29(b) only requires a violation of Section 10(b), not the maintenance of a private suit under Section 10(b). Therefore, looking to the statutory language of the anti-fraud provision, we note that an individual violates Section 10(b) – and therefore triggers Section 29(b) – when he or she employs manipulative or deceptive devices in connection with the purchase or sale of securities. The situation is analogous to a government prosecution under Section 10(b), in that the government is not required to meet the normal standing requirements imposed on those asserting a private remedy, inasmuch as the government need not demonstrate that the defendant's conduct induced reliance by investors or affected the price of the security."

Misstatement

142. My conclusion that in New York law the special facts doctrine cannot impose a duty to speak is fatal to this limb of Odeon's defence. I would not, in any event, have found that the application of such doctrine imposed a duty on Mr Rohailla to disclose the matters alleged, because they do not represent essential facts known

to him which rendered the transaction inherently unfair in the absence of disclosure.

143. Mr Patton relied on answers given by Mr Rohailla in cross examination that when he was initially offered the Bonds at an indication of 20, he thought that it might have been a mistake because of the low price; that the possibility was reinforced when he did his own calculation of value at low 40s on the Monday morning, which caused him to wonder how genuine the indication was; and that after he had had the firm offer, the delay in Mr Ashiq providing the trade ticket and Mr Agresta's relayed comments fuelled his suspicion that "there was something wrong with the offer". However the pleaded case is that the essential facts which ought to have been disclosed to Odeon were what Mr Agresta said, and what Mr Rohailla had said to Mr Ashiq about having sold on to Morgan Stanley, not what Mr Rohailla's state of mind was about the price being offered. Moreover Mr Rohailla did not have any superior knowledge to that of Shooters Hill or Odeon about the price at which the Bonds were being bought, and could reasonably have expected them to form their own view about whether it was low enough to raise doubts about whether the seller would perform.

144. What Mr Agresta had said related to whether a trade had been concluded up the line, but it was followed by his parting remark saying "I am going to come back to do it", and then by Mr Ashiq telling Mr Rohailla on the phone at 1741 that it looked like they were getting confirmation from the seller, and finally by the confirmation by Mr Ashiq that Odeon would send the trade ticket, which followed the receipt of a trade ticket from Mr Agresta. In substance all that Mr Rohailla knew was that Mr Agresta had been saying that somewhere up the line the seller was saying that the buyer had jumped the gun, and that having said he was going to fix it, he had apparently done so by confirming the trade, so that Mr Rohailla had no reason to believe that the apparent problem had not been remedied. The transaction was not inherently unfair to Odeon if these matters were withheld. They would not provide substantial grounds for doubting future performance on the seller's side, and moreover had they done so, Mr Rohailla could reasonably expect Odeon to look to Shooters Hill to be made aware of them.

145. Although what Mr Rohailla had said to Mr Ashiq about Morgan Stanley having sold on was a reckless untruth, it was gilding the essential point which he was making, which he believed to be true, that he had concluded a contract by accepting a firm offer and had contracted with his buyer on the faith of it. It was not said to Mr Agresta, but to Mr Ashiq after Mr Agresta had left the call saying that he was going to get the deal confirmed. It amounted to the reckless addition of what turned out to be an untrue point of detail so as slightly to overegg his otherwise valid point that he had sold down the line in reliance on a firm offer from City & Continental. There is no reason to conclude that it was passed on by Mr Ashiq or that it played any part in Mr Agresta doing what he had already just promised to do, which was to get the trade confirmed. It was not something which ought to have been perceived as having any significant bearing on the prospects of City & Continental performing the contract.

Scienter

146. For similar reasons I find that Mr Rohailla did not have scienter at the time of entering into the Odeon contract in relation to the matters it is alleged he had a

duty to disclose. His dishonesty in what he said to Mr Ashiq and Mr Rhodes during the negotiations about the price of indications and bids and offers up and down the line is not here relevant. There was no dishonesty or recklessness in failing to disclose what he knew of Mr Agresta's position or his previous reckless untruth about Morgan Stanley having sold on. An honest person in his position would not have thought it necessary to disclose such matters in order to act reasonably and fairly.

Materiality

147. For similar reasons I would conclude that the undisclosed facts were not material. When dealing with reliance and materiality, the evidence of Odeon's witnesses, and at times Mr Patton's submissions, mischaracterised the case as being that the Bonds could never have been delivered because they had not been sold by Tilden Park. This was not the pleaded case, nor what Mr Rohailla is alleged to have known. Nor indeed is it obviously the position on the evidence, because if no purchase from Tilden Park had occurred at the moment of the sale to Odeon, that would not necessarily preclude the Bonds being bought in thereafter to fulfil a sale.

148. Accordingly this defence fails.

Issue 5 Unilateral mistake

149. This limb of Odeon's defence relies on the same factual allegations as those relied on as 1934 Act violations. The case advanced is that Odeon was mistaken in that it did not know about what Mr Agresta had said in relation to City & Continental performing, or about Mr Rohailla's reckless untruth that Morgan Stanley had sold on the Bonds; and that Mr Rohailla knew or ought to have known of this mistake, which entitled Odeon to rescind.

150. This issue is governed by New York law. A good starting point is §153 of the Restatement (Second) of Contracts which was cited with approval (albeit in a dissenting judgment) in the decision of the Court of Appeals for the Second Circuit in *Middle East Banking Company v State Street Bank* (2012) 821 F2d 897:

> "Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in §154 and
>
> (a) the effect of the mistake is such that enforcement of the contract would be unconscionable; or
>
> (b) the other party has reason to know of the mistake or his fault caused the mistake."

151. The mistake must be as to a basic assumption on which the mistaken party entered into the contract, which must have a material effect on performance. This imports a test of reasonable reliance, and a further test of materiality which is the same "total mix" test as applies to 1934 Act violations (see above).

152. There was a dispute between the experts as to what degree of knowledge or fault was required on the part of the person not suffering under the mistake. Professor Karmel's opinion was that the test was one of "should have known" so that negligence was sufficient; but that the two limbs were not true alternatives, and because rescission was an equitable remedy, it was always necessary for the rescinding party to show that it would be unconscionable for the other party to be allowed to take advantage of the mistake. Her view is supported by the decision of the District Court in *Summit Health Inc v APS Healthcare Bethseda* 993 FSupp2d 379 in which Ramos J stated that the defence is available if the other party "either knew or should have known" of the mistake; and noted at footnote 19 that whilst the courts had been inconsistent about the mental element, the Second Circuit's interpretation in *Middle East Banking* had treated fraud and "knew or should have known" as "alternative" tests, which "captures the general state of New York case law". Mr Gelber opined that what was necessary was fraud or some other wrongdoing, and that the "should have known" test required a degree of knowledge akin to a reckless disregard of information which ought to have been known; mere negligent failure to appreciate that the other party is mistaken is insufficient. Given Professor Karmel's acceptance that even in cases of negligence there is an additional unconscionability test, the difference between them is a narrow one and is not critical on the facts of this case.

Odeon under a mistake

153. It is established that Odeon did not know about the matters pleaded and to that extent was under a mistake. However the evidence of Odeon's witnesses in this context, and Mr Patton's submissions, again strayed into a mischaracterisation of the case as being that Odeon's mistake was in not knowing that the contract was impossible of performance from the outset because Tilden Park had never sold the Bonds to anyone. Again this was not the pleaded case, nor what it is alleged Mr Rohailla knew or ought to have known. The pleaded mistake is only as to the specific matters of what Mr Agresta had said about a concluded agreement and what Mr Rohailla had said to Mr Ashiq about Morgan Stanley having sold the Bonds on.

Reliance

154. I am not persuaded that such a mistake made any difference to Odeon entering into the agreement. Mr Nissim would still have concluded the deal if he had been told of Mr Agresta's earlier concerns about having jumped the gun once he knew that the offer had been confirmed, or if he had been told of Mr Rohailla's immaterial lie about Morgan Stanley having sold on the Bonds. The mistake was therefore not as to a basic assumption on which Odeon relied when making the contract.

Materiality

155. For similar reasons, and as I have endeavoured to explain in relation to the 1934 Act defence, the pleaded matters of which Odeon was unaware do not satisfy the test of materiality.

Mr Rohailla's state of mind

156. Again for the same reasons as I have endeavoured to explain in relation to the 1934 Act defence, it is not established that Mr Rohailla knew or ought to have known that Odeon was unaware of what Mr Agresta had said. If material, he could reasonably have expected Shooters Hill to inform Odeon. In any event if he knew or ought to have known that Odeon was unaware of what Mr Agresta had said, that fact, together with his knowledge that Odeon were unaware of his lie to Mr Ashiq that Morgan Stanley had sold on the Bonds, would not make it unconscionable for Molton Street to enforce the contract. Neither would have been perceived as material. An honest and reasonable person in Mr Rohailla's position would not have regarded either as having a significant bearing on the likelihood of City & Continental performing the contract.

157. Accordingly this defence fails.

Issue 6 Implied term as to performance

158. Odeon contends that it was an implied term of any contract that Odeon would be excused from performance if City & Continental failed to deliver the Bonds, thus preventing performance by Odeon. If the matter were governed by English law such a contention would be hopeless. Such a term is not necessary, obvious or reasonable. The reasonable observer would not understand the contract to bear that meaning (see ***Attorney General of Belize v Belize Telecom Ltd*** [2009] 1 WLR 1988) because it is inconsistent with Odeon's express obligation to deliver the Bonds, and it is in the nature of counterparty risk in such transactions that the seller assumes the risk of his seller failing to perform. There is nothing in the fact that this agreement was negotiated initially by Shooters Hill to undermine that conclusion.

159. Odeon's contention is no more valid under New York law. The task of the court in deciding whether to imply terms into a contract is to determine what the parties would have intended if they had explicitly considered the issue: *Great Lakes Transit Corp. v Marceau* 154 F2d 623, 628. In *Clarex v Natixis* 2014 WL 4276481 the District Court said: "This Court declines to hold that a principal is excused from performing its obligation to deliver a security because performance has simply become more expensive or because its counterparty has failed to deliver the securities in a transaction in which such delivery is not an express condition. Given the importance of the securities industry in New York, and the ramifications of an expansion of the impossibility defense as suggested by Natixis, its argument must be validated by clear authority, which the Court has not identified." Although what was there said was in the context of a defence of commercial impracticality, rather than implied term, it illustrates that the parties are not to be taken to have intended, in the absence of express stipulation, that the seller of securities is to be excused from performance merely because the seller's counterparty has failed to deliver.

160. Accordingly this defence fails.

Issue 7: Implied term as to criminal conduct under English law

161. This defence only arises if, contrary to my earlier finding, the contract would have been governed by English law. The conduct here relied on is that of Mr Rohailla in lying to Mr Ashiq about the price at which he was selling on, and the reckless untruth about Morgan Stanley having sold on. Odeon's case is that it was an implied condition of the alleged contract that neither party had breached or would breach the prohibitions contained in Part 7 of the Financial Services Act 2012. Section 89 of the 2012 Act makes it a criminal offence for a person to make false or misleading statements, made knowingly or recklessly, with the intention of inducing another person to enter into an agreement to sell "relevant investments", which would include the Bonds. Odeon's case is that this condition is analogous to the implied term of honesty found in ***Yam Seng Pte Ltd v International Trade Corporation Ltd*** [2013] 1 All ER (Comm) 1321 at paragraphs [134]-[137], and that commercial people transact against an assumed background of honest conduct.

162. The argument is for a novel form of implied term, which is not as to future conduct but relates to conduct prior to entering into the agreement. I have considerable doubts whether there is any room for the implication of such term in circumstances where it is not alleged that false statements were made to or relied on by Odeon (which would afford a remedy in deceit) and where these allegations are not said to found an *ex turpi causa* defence (which rests on different aspects of Mr Rohailla's conduct: see below). However in light of the fact that the issue does not arise on my earlier findings, I prefer to express no concluded view.

Damages

163. The primary way in which Molton Street puts its claim for loss suffered by reason of Odeon's failure to deliver the Bonds relies upon the resale to Morgan Stanley, and arises under two heads. The first is the loss of profit that it would have made, measured by the difference between its purchase price (22) and sale price (35.5). The second head is Molton Street's exposure to a claim for damages by Morgan Stanley for non delivery. In the alternative, if such damages are irrecoverable, Molton Street advances a claim for the difference between the purchase price of the Bonds and their market value. I shall refer to the claims as the loss of profit claim, the indemnity claim and the market value claim respectively.

164. As to the indemnity claim, Morgan Stanley has not advanced any claim against Molton Street, although it has said that the trade is still open. Mr Atrill submitted that the Court should now order an indemnity. That would be inappropriate in the absence of a formulated claim by Morgan Stanley whose merits could be assessed (see ***Trans Trust SPRL v Danubian Trading*** [1952] 2 QB 297, 303). Mr Patton submitted that there was no prospect of a claim from Morgan Stanley, and that in any event no cause of action for an indemnity arose under New York law until payment of the third party by the indemnifiee, albeit that the position was usually dealt with by third party claims in existing proceedings. I cannot, however, regard the prospect of Morgan Stanley advancing a claim as fanciful in the light of its recent email treating the trade as still open; and were it to do so, the appropriate course would be to reserve this head of claim, if it were otherwise valid, until it

crystallised (cf ***Deeny v Gooda Walker*** [1995] 1 WLR 1026), which was the fall back position of both Mr Atrill and Mr Patton.

165. When the Particulars of Claim were amended to include a claim in damages, both in respect of the indemnity claim and the alternative market value claim, it was ordered by HH Judge Waksman QC that quantification of any damages should be dealt with, if they arose, at a subsequent hearing. I will deal with issues of principle which arise in relation to those heads of claim.

Issue 8: Remoteness

166. Odeon contends that the damages claimed are too remote. This issue is governed by New York Law. The test in New York law is reflected in paragraph 351 of the *Restatement of the Law, Second, Contracts* in the following terms:

> "(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
>
> (2) Loss may be foreseeable as a probable result of the breach because it follows from the breach
>
> (a) in the ordinary course of events; or
>
> (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know."

167. The test not only requires loss of profit to be a type of loss which is reasonably foreseeable, but also that the extent of lost profit is reasonably foreseeable. As Mr Gelber put it in his first report, the "relevant inquiry is whether the onward sales price was reasonably foreseeable".

168. The evidence established two further potential limitations on recoverability:

(1) The Court will only award damages for consequential loss if they satisfy the "tacit agreement" test set out in the decision of the New York State Court of Appeals in *Kenford v County of Erie* 67 NY2d 257, 262 (1986). In that case, the County had agreed with the plaintiffs to build a stadium, which would then be subject either to a 40-year lease or, in the event of a failure to agree the lease, a 20-year management contract operated by the plaintiffs. The stadium was never built, and the plaintiffs claimed damages for the fees they would have earned during the 20-year management period. Such losses were reasonably foreseeable as flowing from the wrongful non-construction of the stadium, but the court quashed a jury verdict for such damages. Having noted that claims for consequential damages such as lost profits needed to be fairly within the contemplation of the parties at the time of the contract, the Court went onto say that there was nothing in the contract itself which suggested that the County would bear the heavy responsibility of paying damages for 20 years of lost management fees. It observed:

> "In the absence of any provision for such an eventuality, the commonsense rule to apply is to consider what the parties would have concluded had they considered the subject. The evidence here fails to demonstrate that liability for loss of profits over the length of the contract would have been in the contemplation of the parties at the relevant times."

(2) A court may limit damages for foreseeable loss by excluding recovery for lost profits if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation. The principle is set out in paragraph 351(3) of the Restatement, which goes on to explain in the commentary:

> "f. Other limitations on damages. It is not always in the interest of justice to require the party in breach to pay damages for all of the foreseeable loss that he has caused. There are unusual instances in which it appears from the circumstances either that the parties assumed that one of them would not bear the risk of a particular loss or that, although there was no such assumption, it would be unjust to put the risk on that party. One such circumstance is an extreme disproportion between the loss and the price charged by the party whose liability for that loss is in question. The fact that the price is relatively small suggests that it was not intended to cover the risk of such liability. Another such circumstance is an informality of dealing, including the absence of a detailed written contract, which indicates that there was no careful attempt to allocate all of the risks. The fact that the parties did not attempt to delineate with precision all of the risks justifies the court in attempting to allocate them fairly. "

169. It is convenient to consider the loss of profit claim, indemnity claim and market value claim separately.

The loss of profit claim

170. Odeon's case was that in this market, the mark-up would be expected to be a payment on top in the region of 8 to 16 ticks (i.e. 0.25-0.5% of face value), which is the extent to which Odeon could reasonably have foreseen that Molton Street would lose profit on a resale. I am persuaded that a mark up of no more that 1% would have been within the reasonable contemplation of Odeon for the following reasons:

(1) Molton Street was a small broker dealer whom it was not contemplated would be running a position by holding the Bonds. This is readily apparent from the negotiations, which were premised on prices being bid and offered up and down the line from Mr Rohailla. It was therefore objectively contemplated by Odeon, Shooters Hill and Molton Street (whatever Mr Rohailla's fraudulent intentions) that Molton Street would sell on in a matched or riskless principal transaction, both because it was a small broker dealer which only traded as a

matchless principal, and because that was the stated assumption on which negotiations were conducted.

(2) It was the evidence of Mr Schwartzberg and Mr Van Alstyne that in a riskless principal transaction, a standard and usual mark up for bonds of this nature would be in the region of 0.25 to 0.5%.

(3) Mr Rohailla's evidence was that previously he had managed to get as much as a full point on a trade i.e. 1% but he did not suggest that he had ever previously made a greater turn.

(4) In a recent Complaint brought by the SEC against traders at Nomura Securities International Inc for making an illegal turn on residential mortgage asset backed securities by lying about the bid and offer prices, Nomura's standard going rate for a payment on top was said to be 8 ticks.

(5) 0.5% was the mark up which Mr Rhodes agreed Mr Rohailla should get, on the assumption that that was Mr Rohailla's entire profit from the transaction as being additional to the price which Mr Rohailla was paying his seller.

(6) On the Friday evening, Mr Ashiq added 0.5% to Mr Agresta's original indication of 20.5% before offering it on, and then disclosed to Mr Agresta that he had done so.

(7) Ultimately 1% was the mark up negotiated by Shooters Hill for Odeon (buying at 21 and selling at 22), which fell to be split as to 0.9% to Shooters Hill and 0.1% to Odeon.

171. Odeon's witnesses also relied on FINRA rule 2121 which requires mark ups to be fair and establishes as a guideline the principle that mark ups in excess of 5% of the broker's contemporaneous cost are presumptively excessive. I did not find this a useful piece of evidence because it appeared that the rule only applies to transactions with "customers", which is defined as excluding broker dealers.

172. Mr Atrill argued that even if, as I conclude, it was contemplated that Molton Street were buying to sell on, rather than take a position, nevertheless its overall loss would be just as large if it sold on at a turn of 1% or less, because of its exposure to the buyer down the line, whom it could reasonably be contemplated would be buying to hold. So assuming the foreseeable value to someone taking a position to be 50, for example, Molton Street would still suffer a loss of the difference between 22 and 50 if the Bonds were not delivered, however much its own turn; if it sold on at 22.5 its loss of profit claim would be for 0.5, but its indemnity claim would be for 27.5 (50 less 22.5); if it sold on at 35.5 its loss of profit claim would be for 13.5 but its indemnity claim 14.5 (50 less 35.5) The overall loss (28 in the example given) is no different whatever the resale price; the only difference is in the split between what is a loss of profit claim and what is an indemnity claim.

173. I was not attracted by the argument. If, as I conclude, it was not within the reasonable contemplation of the parties that Molton Street would take a position or sell on at more than a 1% turn, that is the limit of the reasonably foreseeable loss of profit sufferable by Molton Street. Whether an indemnity claim satisfies the remoteness test is not here in point. There might not be any indemnity claim. What matters is the foreseeability of the claim actually being advanced.

174. Had I reached a different conclusion on foreseeability, I would not have regarded the tacit agreement requirement as precluding recovery. If loss of profits of the amount claimed were within the contemplation of the parties, there is nothing to suggest that the parties would not have regarded them as recoverable: such would have been inherent in the allocation of risk. Nor would I have regarded this as one of the "unusual" cases in which a New York Court would have disallowed recovery of the loss as unjustly disproportionate to Odeon's turn. These were sophisticated commercial parties of equal bargaining power who accepted the contractual allocation of risk and the exposure to liability for reasonably foreseeable lost profits.

The indemnity claim

175. Nothing I have said about Molton Street's own profits applies to the indemnity claim. It was reasonably foreseeable that Molton Street would sell on to someone taking a position, who would suffer a loss if Odeon failed to deliver the Bonds, measured by the difference between the contract price and the market value, for which Molton Street would or might well be liable. That loss would not be too remote and would not be barred by the tacit agreement test or the exercise of a residual injustice discretion.

The market value claim

176. It follows from my conclusions in relation to the loss of profits claim that the market value claim was not reasonably foreseeable. It was not contemplated that Molton Street would be buying to hold a position, but only that it would sell on at a turn of no more than 1%. This would be a back to back contract with contemporaneous settlement and this was an illiquid market in which Molton Street could not have been expected to be able to buy in to enable it to perform. I am not concerned with mitigation damages which might arise from securing the Bonds for delivery thereafter. Accordingly it was only reasonably foreseeable that Molton Street would suffer a loss calculated by reference to its contemplated onsale, not a freestanding market value loss.

Issue 9: Ex turpi causa

177. The *ex turpi causa* defence is pleaded by Odeon as a ground on which both the loss of profit claim and indemnity claim is irrecoverable. The pleading does not rely on anything said by Mr Rohailla to Mr Ashiq as part of the turpitudinous conduct. The turpitudinous conduct relied on for the purpose of this defence is that of Mr Rohailla in deceiving Mr Rhodes in:

(1) the Bloomberg message at 1408 by telling Mr Rhodes that the seller was looking for a bid in the mid 30s;

(2) the telephone conversation at 1455 by again telling Mr Rhodes that the seller was looking for a bid in the mid 30s;

(3) the Bloomberg message of 1504 by telling Mr Rhodes that the offer was 35 and suggesting going in with a bid of 32; and

(4) the Bloomberg message at 1710 by telling Mr Rhodes that the Bonds were offered at 35.

178. As a result of three recent decisions of the Supreme Court, the law is in a state of some uncertainty. In ***Les Laboratoires Servier v Apotex*** [2015] AC 430, Lord Sumption JSC (for the majority) referred at paragraph [18] to the test laid down in ***Tinsley v Milligan*** [1994] 1 AC 340, which is that the doctrine only applies where it is necessary for the claimant to "rely on (i.e. to assert, whether by way of pleading or evidence) facts which disclose the illegality" By contrast, in ***Hounga v Allen*** [2014] 4 All ER 595, Lord Wilson JSC (also for the majority) referred at paragraphs [31]-[40] to a test, originating in tort claims, based on an "inextricable link" between the claim and the illegality; and Lord Hughes JSC (for the minority) at paragraph [55] applied a test of "sufficiently close connection." Most recently, in ***Jetivia SA v Bilta (UK) Ltd*** [2015] 2 WLR 1168, Lord Neuberger PSC (with the agreement of the majority) identified but declined to resolve the conflict, and said at paragraph [15] that the proper approach needs to addressed by the Supreme Court, conceivably with a panel of nine judges, as soon as appropriately possible. In a very recent decision, ***Sharma v Top Brands & others*** [2015] EWCA Civ 1140, the Court of Appeal declined to embark upon an analysis to resolve the conflict between ***Tinsley*** and ***Hounga*** on the grounds that it did not matter to the disposal on the facts of that case.

179. It is a conflict which is of potential significance in this case because Mr Rohailla's misconduct vis a vis Mr Rhodes would not fulfil the **Tinsley** reliance test: all Molton Street needs to plead and prove is the contract with Morgan Stanley, not any facts about how it came into existence. However if the "inextricably linked" test were to be applied I would conclude that it was fulfilled:

(1) The claim for loss of profit is for the very profit which Mr Rohailla procured by practising his deception on Mr Rhodes. The damages are based on the difference between the purchase price and the sale price to Morgan Stanley in circumstances where the latter was procured by Mr Rohailla's fraudulent conduct. Mr Atrill argued that Mr Rohailla's deception did not play any part in inflating the claimed loss: the relevant counterfactual is what would have happened if the representations had not been made, not if they had been true; and Mr Rhodes would have been prepared to bid 35.5 irrespective of Mr Rohailla's deception, as is evident from his bid at 40 in the BWIC. I would not accept that argument. The relevant counterfactual is indeed what would have happened had the misstatements not been made; but it is a fallacy to posit that in those circumstances Mr Rhodes would simply have bid blind without inquiring what Mr Rohailla was being offered by his seller; when dealing with a small broker dealer like Molton Street, Mr Rhodes would have based a bid only on what he thought was being offered up the line, which is why Mr

Rohailla practised his deception about that in this case. The counterfactual is therefore that if any sale to Morgan Stanley would have been achieved at all, it would have been based on the true price being offered to Molton Street. Odeon's broad submission, that the loss of profit claim involves an attempt by Molton Street to secure the fruits of its own fraudulent conduct, is well founded.

(2) The same reasoning does not directly apply to the indemnity claim, which would fall to be quantified by reference to the difference between the price at which Morgan Stanley bought and the price at which it sold or could have sold to its customer, or market value if that is different. If Morgan Stanley was deceived into paying more than it otherwise would, that goes to diminish, not inflate, the quantum of the indemnity claim. Nevertheless the exposure to liability towards Morgan Stanley under a contract procured by fraud would in my view inextricably link the claim for an indemnity with the fraud so as to attract the operation of the *ex turpi causa* doctrine if the test is that identified in ***Hounga***.

180. The market value claim is not affected by the *ex turpi causa* argument because it arises entirely independently of the Morgan Stanley contract.

181. In view of the fact that it is not necessary to resolve the ***Tinsley/Hounga*** conflict in order to decide this case, and the fact that the issue was not fully argued, I prefer not to embark upon any attempt to do so.

182. I should record two further arguments advanced by Odeon. First Mr Patton argued that the claim cannot be entertained for the additional reason that it would involve awarding the claimant the proceeds of crime; under the Proceeds of Crime Act 2002 ("POCA"), property which constitutes or represents (in whole or in part, and whether directly or indirectly) a person's benefit from criminal conduct is "criminal property" (s. 340(3)); and its possession by someone who knows or suspects its status is an offence (s. 329); criminal conduct, for the purposes of POCA, means conduct which constitutes an offence in the United Kingdom or would constitute such an offence if it occurred there: s. 340(2). A similar argument was rejected by the Chancellor in ***Sharma v Top Brands*** at paragraph [48] where he stated that the particular statutory context of POCA provided no clear steer for the scope and application of the common law *ex turpi causa* principle. I too would reject it.

183. Secondly, Mr Patton advanced a further answer to the indemnity claim by reason of the application of New York law. In the absence of an express indemnification clause, the remedy is governed by the general law of New York, under which public policy precludes indemnification for those who commit intentional torts or active negligence. This was the view of Professor Karmel, which I accept, deriving support from the fact that indemnification is treated by New York law as an equitable remedy and from the decision of the Appellate Division in *Hytko v Hennessey* 62 AD3d 1081, 1086 in which it was said (omitting internal citations):

> "Both subrogation and implied indemnification are equitable causes of action. The purpose of these equitable remedies is to shift a debt or obligation to a party who more properly should be accountable in order to prevent unjust enrichment and an

> unfair result. However, equitable remedies are barred by the doctrine of unclean hands where the party seeking to assert them "has committed some unconscionable act that is 'directly related to the subject matter in litigation' and has injured the party attempting to invoke the doctrine." Additionally, public policy precludes indemnification for those who commit intentional torts or active negligence. Thus, the equitable powers of the courts should not be exerted on behalf of one who has acted fraudulently or has gained an advantage by deceit."

184. This submission is well founded. I conclude that Mr Rohailla's fraudulent conduct vis a vis Mr Rhodes would be treated by a New York Court as precluding the grant of the equitable remedy of an indemnity in respect of Molton Street's liability to Morgan Stanley.

Conclusion

185. Molton Street's claim fails and there will be judgment for Odeon.