Neutral Citation Number: [2007] EWHC 1576 (Comm)

Case No: 2005 1083

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/07/2007

Before :

MR JUSTICE ANDREW SMITH

- -

Between :

Bear Stearns Bank Plc.	**Claimant**
- and -	
Forum Global Equity Ltd.	**Defendant**

- -
- -

Christopher Harrison (instructed by **Simmons & Simmons**) for the Claimant
Paul Greenwood (instructed by **Masseys LLP**) for the Defendant

Hearing dates: 14, 15, 16, 20, 21, 22, 23, 24 and 25 May and 28 June 2007

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Judgment

Mr. Justice Andrew Smith :

1. The main issue in this case is whether the claimants (to whom I shall refer as "Bear Stearns") concluded a contract with the defendants (to whom I shall refer as "Forum") that Bear Stearns would acquire from Forum some distressed debt by way of notes issued by companies in the Parmalat group. Bear Stearns say that such a contract was concluded on 14 July 2005 in a telephone conversation between Mr. Francesco Franzese (for Bear Stearns) and Mr. Paolo Pasquali (for Forum), or at any rate that it had been concluded by some time in October 2005. They also say that if no contract was made, nevertheless Forum are precluded from denying it because of an estoppel by convention. Forum deny the contract and deny that they are subject to any estoppel.

2. Originally Bear Stearns sought an order for specific performance of the contract, but they no longer pursue that claim. They seek damages based upon the value of shares which were issued in the administration of the Parmalat group. The damages claim gives rise to two issues between the parties:

   i) Whether the assessment of damages should bring into account a contract between Bear Stearns and Morgan Stanley whereby Bear Stearns sold on to Morgan Stanley half of their interest in the notes.

   ii) Whether damages are to be assessed by reference to the value of the shares when Forum declined to proceed with the sale in October 2005 or whether

they should be assessed by reference to their value in August or September 2006 when Bear Stearns learned that Forum had disposed of the shares, and as a result abandoned their claim for specific performance.

The market in distressed debt

3. The economic conditions in Europe in the 1990's encouraged the development of a market in "distressed" corporate debt, which was subject to a default of some kind and which was bought and sold at a discount from its face value. From the start European-based traders concentrated on buying debt from original buyers and looking to sell it to investment banks and money managers in the United States, including Bear Stearns.

4. In 1995 the United States organisation, the Loan and Syndications Trading Association ("LSTA"), issued recommended best practice for loan trading, including standard terms and conditions and standard documentation and forms. The Loan Market Association ("LMA") was formed in London in December 1996, its aims being, among others, to standardise and simplify the sale of loan assets and to establish standard settlement practices, and the LMA too issued standard terms and conditions, documentation and forms. The Asian Pacific Loan Market Association ("APLMA") based in Hong Kong is directed to trading in the Far East.

5. Bear Stearns say that relevant in this case are some LMA standard terms entitled "Standard Terms and Conditions for Distressed Trade Transactions (Bank Debt/Claims)", and I refer to the October 2001 version of them (the "LMA terms"), which was current at all times between July and October 2005. The LMA terms themselves state that they apply to "a distressed trade transaction in respect of which they are incorporated by reference", and a distressed trade transaction is said to be:

> "A transaction for the sale or participation of a loan or other form of credit, or participation in a credit facility or a claim in relation to any of the foregoing, which the parties to a transaction, by applying these Conditions, designated as a distressed loan or other form of credit or claim at the time of trade".

6. The LMA terms, like those of the LSTA, provide that prima facie a contract is concluded upon oral agreement of its terms. This is hardly surprising given that trades are made in a fluctuating market: there can be considerable movement in the market while documentation for a deal is being agreed. Thus Clause 2 of the LMA terms provides under the heading "Contract Point" that:

> "A binding contract for the sale or participation by the Seller to the Buyer of the Purchased Asset shall, unless otherwise specified in the Agreed Terms, come into effect between the Buyer and the Seller upon oral agreement of the terms on the Trade Date and shall be documented and completed in accordance with [specified conditions]. The Seller and the Buyer acknowledge that events occurring subsequent to the Trade Date shall not relieve the parties of their obligations under the Confirmation".

The expression "Agreed Terms" is defined as "the terms agreed between the Buyer and the Seller in relation to the transaction, as evidenced by the Confirmation".

7. Clause 3 of the LMA terms deals with recording agreements in written confirmations. It provides:

> "Unless otherwise specified in the Agreed Terms the Responsible Party [who, in this context, is the party who is responsible for preparing the Confirmation as agreed between the Seller and the Buyer on the Trade Date] shall send to the Other Party a form of Confirmation, duly completed, signed on behalf of the Responsible Party and in the form most recently published by the LMA, not later than the second business day after the Trade Date and the Other Party shall sign, and return to the Responsible Party, the Confirmation not later than the fourth business day after the Trade Date. The Other Party shall immediately and, in any event, not later than the close of business on the third business day after the Trade Date, raise with the Responsible Party any disagreement with any of the terms of such confirmation".

8. Thus the LMA terms contemplate that a "Confirmation" should pass between the parties after a trade has been agreed. As clause 3 indicates, the LMA publishes standard forms of Confirmation. They provide for confirmation of the details of the agreement, including for example the settlement date and the "form of purchase" (that is to say, whether it is to be completed by way of a transfer of the asset or in some other way) and other matters, some relatively minor such as the parties' process agents and who is to prepare the documentation. The standard form is not intended to be prescriptive: the form itself states that it should be used as a starting point for negotiation.

9. Clause 4 of the LMA terms is concerned with transactions that are subject to conditions and (to paraphrase sufficiently for the purposes of this judgment) requires the parties to seek to ensure that they are fulfilled and envisages that if necessary the settlement of the deal will be postponed to achieve this.

10. There is no express requirement in the LMA terms that a settlement date must be agreed before a deal is binding, and clause 8 provides for a settlement date twenty business days after the trade date in default of the parties agreeing otherwise.

11. The LMA published a "User Guide", the purpose of which was stated to be "to assist users in their use of the package of standard form documentation for distressed trading…". In July 2005, it contained the following passages:

    i) "…it is not expected that the Standard Terms and Conditions will themselves be amended. If there are any changes to be made these should be set out in the Confirmation. Users must ensure that any proposed changes … are clearly highlighted to their counterparty before the trade is entered into, otherwise they will be bound by the standard (i.e. unamended) forms".

ii) "…the Confirmation is designed to record the terms of the actual trade which takes place on an oral agreement as to its terms. It is therefore expected that users will agree, at the time of the oral trade, all of those matters which are required in order to complete the Confirmation. Having the form of Confirmation to hand (or on screen) and filling it in during the course of the oral trade would therefore appear to be the safest option".

12. A further document, which is published by the LMA together with the LSTA, is a Comparative Study of the standard distressed trade documentation produced by the LMA and the LSTA. It is the work of Clifford Chance LLP and Hunton & Williams LLP, and is dated January 2007. I was referred to these passages about trading covered by the LMA regime:

i) The Confirmation is described as "the core document setting forth the terms and conditions by which the Seller and the Buyer have agreed to be bound, and together with any additional transfer document called for in the Form of Purchase is meant to be read as an integrated whole".

ii) "Assuming the material points of a trade are agreed at the point of a telephone trade (i.e. name and amount of debt, price, Interest Convention, Form of Purchase and LMA terms), an LMA trade will be binding at the point of oral agreement of the terms". ("Interest Convention" refers to the manner in which Accrued Interest will be accounted for between Buyer and Seller. It is not contended that this has any significance in this case.)

iii) "Key information that will always need to be included [in the Confirmation] will be the pricing information, the Interest Convention (which will determine entitlement to interest and Recurring Fees) and Form of Purchase. The Form of Purchase falls into two categories: (1) a Legal Transfer (meaning that the Seller transfers legal and beneficial title to the Distressed asset to the Buyer) or (2) a Funded Participation….If the Seller and the Buyer do not wish to enter into a Legal Transfer …, then the parties would normally elect for a Funded Participation. If the parties elect for a Funded Participation, the Trade Confirmation will also need to record whether the Buyer is to have any voting or information rights".

13. As is reflected in clause 2 and the Comparative Study, the LMA documents contemplate two kinds of purchase, legal transfer and participation. As explained in the User Guide produced by the LMA, a transfer, by way of novation or assignment, "is designed to effect a clean sale of the asset from Seller to Buyer", whereas "the funded participation agreement deals with an ongoing relationship between two parties, the Grantor of the participation (who will usually be the lender of record) and the Participant". The Comparative Study explains that participation has no technical meaning under English law but "it normally refers to a back-to-back funding arrangement with a third party. Under English law, a Participation (or sub-participation as it is sometimes called) creates a debtor/creditor relationship between Grantor and Participant rather than a true sale relationship with respect to beneficial ownership of the underlying loans and Commitment".

<u>The Parmalat notes</u>

14. The notes which are the subject of this litigation are a note issued by Parmalat SpA, an Italian company, and notes issued by Parmalat Netherlands BV ("Parmalat BV"), a Dutch company.

15. The note issued by Parmalat SpA (to which I shall refer as the "SpA note") was dated 10 October 1997 and matured on 10 October 2007. It was for a principal sum of US$14 million, and was issued to Principal Mutual Life Insurance Company (which later became Principal Life Insurance Company, and to which I shall refer as "Principal"), or registered assigns. It provided that,

> "This Note is a registered Note and, as provided in the Note Purchase Agreements, upon surrender of this Note for registration of transfer, duly endorsed, or accompanied by a written instrument of transfer duly executed, by the registered holder hereof or such holder's attorney duly authorized in writing, a new Note for a like principal amount will be issued to, and registered in the name of, the transferee."

16. The distressed debt of Parmalat BV was represented by a series of eight notes (the "BV notes") issued to Principal for a principal sum of US$8 million. The debt was guaranteed by Parmalat SpA. The BV notes contained terms about their transfer comparable to that in the SpA note.

17. The Parmalat Group collapsed financially in 2003 amid allegations of fraud and corruption. On 27 December 2003 the Group was declared insolvent, and administration proceedings were brought in the Italian Court of Parma. The collapse of the Parmalat Group caused considerable turmoil in the Italian markets; on the day of the collapse, the Italian government passed a specific law, the Marzano Law Decree, to deal with the insolvency, a law that was later amended. There was much uncertainty about the procedures that would be followed in the insolvency and what the outcome for creditors would be. They faced a significantly more complicated procedure for presenting claims in the insolvency than is usual.

18. On 8 November 2004 Forum, who had acquired the notes, filed claims in the administration to be admitted to the list of creditors of Parmalat SpA and Parmalat BV. The claim against Parmalat SpA was both in respect of liability arising from the SpA note and as guarantors of the obligations of Parmalat BV. On 16 December 2004 Forum's claims were accepted, for €18,043,542.38 in the case of Parmalat SpA and €6,751,193.31 in the case of Parmalat BV.

19. In early October 2005 the debt represented by the notes was converted into equity by way of shares in a new company which took over the name Parmalat SpA. (I shall refer to the company as "new Parmalat SpA".) The Court of Parma gave its approval to this arrangement on 1 October 2005, and the shares were listed on the Milan stock exchange on 6 October 2005, initial pricing being €3.175 per share.

Bear Stearns

20. Bear Stearns are the Irish subsidiary of an investment bank and securities and trading business. They have offices in New York and at Canary Wharf, London. As they contend, they made the agreement that gives rise to this dispute through the London

office. Since 2001 the head of the London "distressed debt/high yield team" has been Mr. Nathan Held, a Managing Director Principal of Bear Stearns. Mr. Franzese is one of the "marketers" who works under Mr. Held.

Forum

21. Forum are an investment fund company incorporated in the British Virgin Islands, which invests in European and American fixed rate securities and equities. The custodian bank to the fund is Credit Lyonnais, who hold the shares and bonds of the fund and act as a clearing agent when the fund buys or sells investments. The fund is managed by GDP De Patrimoines SA ("GDP"), a Swiss company that offers fund management, private banking and securities services and advice. GDP's two executive managers (who are also share holders) are Mr. Roberto Villa and Mr. Romano Binotto. Its sole director is Mr. Francois Kirschmann.

22. The GDP group includes a company called SP Securities SA ("SP"), which was established in November 2003 and provides brokering services. Brokering services were previously provided by GDP itself, but that part of the group's activities has been devolved to SP. SP share GDP's premises in Switzerland. Mr. Alberto Minerva and Mr. Paulo Pasquali have been employed as brokers by SP since SP was established, and they work closely together.

Forum's acquisition of the notes

23. In January 2004, Forum acquired some credit linked notes ("cln's") due in 2005, which had been issued by Merrill Lynch on 6 October 2000. The assets underlying the cln's included the SpA note and BV notes, and when they defaulted, the holders of the cln's were entitled to what were referred to as "deliverable obligations". Forum received the SpA note and the BV notes by way of such "deliverable obligations". At the start of the hearing before me there was an issue between the parties as to whether these notes were transferred to Forum by way of electronic transfer or by physical delivery. It is now common ground that they were transferred physically, as contemplated by the terms of the notes.

24. In 2004 Mr. Franzese worked for Merrill Lynch and he had acted for them in this matter. Mr. Pasquali acted for Forum. In his first witness statement for the trial Mr. Franzese said that the transfers to Forum were made upon the basis of standard LMA wording. However, before the trial, in a statement dated 8 May 2007 he corrected this and acknowledged that LMA terms were not used.

The witnesses

25. Bear Stearns called three witnesses of fact:

    i) Mr. Franzese, who had been a "marketer" of fixed income products since 1997, initially with Deutsche Bank, then with Merrill Lynch and since July 2004 with Bear Stearns;

    ii) Mr. Nathan Held, who has worked for Bear Stearns for some twelve years; and

iii) Mr. Neil Pigott, who is an English solicitor and an attorney of the New York bar. In 2005, he was working in New York with Mandel, Katz, Manna & Brosnan, LLP ("Mandel"), who were instructed by Bear Stearns in relation to the purchase of the notes.

26. The witnesses of fact called by Forum were Mr. Villa, Mr. Minerva, Mr. Pasquali and Mr. Stefano Lombrassa, who is an Italian Avvocato working for Freshfields Bruckhaus Deringer ("Freshfields") as an associate.

27. Mr. Villa and Mr. Minerva do not speak English, and they gave their evidence through an interpreter. Mr. Pasquali and Mr. Lombrassa gave their evidence in English. However, at times they clearly had some difficulty in expressing themselves and I have had to bear this in mind when assessing their evidence and in particular when reminding myself of it from the transcript. Similarly I have been cautious about interpreting too literally some of the evidence of Mr. Franzese whose first language is, I think, Italian, although his English was relatively good and certainly more fluent that that of Mr. Lombrassa and Mr. Pasquali.

28. I consider that all of the witnesses of fact were honest and seeking to give truthful evidence. However, with the exception of Mr. Pigott (whose evidence was relatively peripheral), I consider that they all allowed themselves to be drawn into arguing (no doubt sincerely) the case of the party who called them and as a result it was sometimes difficult to distinguish their evidence about what they recalled from what they thought must have happened or was likely to have happened, a problem sometimes aggravated by the language difficulty. This was particularly so in the cases of Mr. Villa and Mr Pasquali. Although Mr. Minerva, I do not doubt, was trying to give accurate and careful evidence, his oral evidence was in some respects different from what he said in his witness statements, and I have therefore thought it necessary to treat his evidence too with some caution.

29. Both parties called expert evidence from a witness experienced in the market.

30. Bear Stearns called Mr. Anthony Tucker, who before his retirement in April 2004 was the Head of Loan Trading at the Bank of America, and who has relevant experience going back to the 1970's. He joined the Board of the LMA in 1999 and was chairman of their Distressed Debt Committee and was involved in developing standard documentation for trading distressed debt.

31. Forum called Mr. Dennis Buckley, who has over 34 years' experience in commercial and investment banking. In 2004, as a director of UBS Investment Bank charged with establishing their London business in stressed and distressed loan sourcing and trading, he was much involved with Parmalat instruments. In 2004/05 he served on the working market committee of the LMA that was set up to harmonise stressed and distressed loan documentation.

32. Both Mr. Tucker and Mr. Buckley were well qualified to give expert evidence and were trying to assist the court. Mr. Tucker was a particularly thoughtful and detached witness. I thought that Mr. Buckley was less detached and unwilling to weigh considerations that went against the views which he had adopted, but he did give useful insight into how the market operates.

Discussion before 14 July 2005

33. The first contact between Bears Stearns and SP about the notes was in March 2005. Mr. Villa had spoken with Mr. Minerva of a company who had Parmalat instruments on their books, and had said that the company should dispose of them because after the collapse of the Parmalat group the notes would be worth much less than their face value. As Mr. Minerva recognised, the value of the notes lay in the claims in the Parmalat administration that the note holder would have, and accordingly their value was uncertain. Similarly Mr. Held said in evidence that he regarded Parmalat notes and the corresponding claims in the administration as inseparable, and he was aware from an early stage that the claims were to be converted into shares in new Parmalat SpA.

34. Mr. Minerva and Mr. Pasquali had both had dealings with Mr. Franzese in the past. They had dealt on six or seven previous occasions, usually, if not always, buying and selling bonds. Their previous dealings had not been subject to LMA terms. Mr. Franzese said that typically these previous deals were on the primary market, and once the major terms were agreed, they were set out in a term sheet that was sent to the counterparty; then the price was agreed and the deal closed, and it was recorded in a confirmation that set out the final terms.

35. After Mr. Villa had spoken to him about the notes, Mr. Minerva discussed them with Mr. Franzese, who was already familiar with them because of his involvement when they were transferred to Forum. Mr. Franzese told Mr. Minerva that Bear Stearns might be interested in buying them. He made contact with Mr. Held and others in Bear Stearns, and sought an indication of what Bear Stearns might pay for the notes. On 22 March 2005 Mr. Held told him that an "indication bid" for the SpA note was 12% of the value of the corresponding claim in the Parmalat administration (or €2,177,225.08) and for the BV notes was 18% of the claim (or €405,071.60). The indicative bid was therefore in total €2,582,296.68. (Mr. Held indicated this price because of what he was told by Mr. Paul Marhan, an analyst and senior manager of Bear Stearns in New York, where there was an active market in Parmalat debt.) Mr. Franzese told Mr. Minerva of this "indication bid" by telephone, but Mr. Minerva said that his client was not willing to sell for that price.

36. One consideration that informed the price that Bear Stearns was willing to pay was the hope of pursuing what has been called the "late filing claim". Bear Stearns' intention was to make a further claim in the administration of the Parmalat group on the basis that, because Parmalat Finanziaria SpA ("Finanziaria") had for a time held all the shares in Parmalat SpA, Finanziaria were responsible for paying the sum due under the SpA note. (No comparable claim was made in respect of the BV notes, although Parmalat SpA had guaranteed them.) The claim is called the "late filing claim" because it was not made within the original time limits for claims in the administration. It was filed on 28 August 2005, but has not been accepted by the Administrators and is still being pursued: Bear Stearns has spent €42,670 pursuing the late filing claim. I understand that in Italian insolvency proceedings the procedures for claims that are filed late, that is to say after the list of creditors has been approved by the court, are typically more complex and subject to a more formal procedure than ordinary claims, but I am not in a position to assess the prospects of the late filing claim succeeding.

37. Mr. Franzese had further telephone conversations with SP between March and July 2005, and the parties came closer to agreeing a price. Although Mr. Minerva's usual practice as a broker is not to identify his client, at an early stage in the discussions he told Mr. Franzese the name of Forum because he understood that in the circumstances of this rather unusual transaction Bear Stearns would need to check that the notes were held by SP's client and had been admitted in the administration.

38. On about 18 May 2005 Mr. Minerva asked Bear Stearns for an updated indicative bid. Mr. Franzese consulted again with Mr. Held and on 19 May 2005 he put forward an indicative bid of 11.5% for the claims against SpA (under the SpA note and as guarantor of the BV notes) and an additional 7.5% for the BV notes, explaining that the "Ultimate bid will depend on amount of accrued in claims". Mr. Minerva again said that his client would not consider a bid at that price.

39. The focus of these exchanges was the price: indeed, Mr. Minerva was told by Mr. Villa "to find the price and then leave all the details in the hands of the lawyers", who were to become involved after there was agreement on the price. (This was Mr. Minerva's evidence. Mr. Villa said that he told SP to find the price and find the settlement date and then the matter would be dealt with by the lawyers. If it matter, I prefer the evidence of Mr. Minerva, and certainly I reject any suggestion that Mr. Villa placed any real emphasis in his instructions to SP about agreeing the settlement date: there would have been no real reason to do so. Mr. Minerva confirmed that Mr. Villa had not mentioned any settlement date.)

40. There was, however, some discussion between Mr. Franzese and SP about how any deal might be documented. (According to Mr. Villa, this enquiry did not come from GDP and apparently SP raised the question on their own initiative.) On 18 May 2005 Mr. Franzese sent to Mr. Held an email in which he said that "the client" (as he referred to Forum or SP) was asking for information about how the transaction would be executed. Mr. Held told Mr. Franzese that he was "working on getting you sample documentation", but in the event he provided no information of that kind before 14 July 2005.

41. Mr. Franzese's evidence was that he told both Mr. Minerva and Mr. Pasquali that they would trade on standard terms, and that the documentation would be sorted out by lawyers after the trade was concluded. He said that he explained this to Mr. Minerva three or four times, or possibly more. Mr. Franzese considered that it was not for him to become involved in legal questions. Mr. Franzese said that Mr. Pasquali and Mr. Minerva too did not want to become involved in discussions about the terms of any deal, and wanted to pass the matter over to lawyers once the price had been agreed.

42. When referring to standard terms, Mr. Franzese had in mind the standard terms produced by the LMA for distressed transactions, but he accepts that he did not expressly refer to them. Nor did SP ask what he was referring to or what the standard terms provided. Mr Franzese accepted that neither Mr. Minerva nor Mr. Pasquali expressly agreed that the trade should be done on standard terms.

43. However, Mr. Franzese expanded upon what he said to SP about standard terms. He said that he told them that the lawyers would have to prepare documentation and agree upon it and "it's pretty standard". He agreed that what he meant was that the

lawyers agree upon "pretty standard" terms, that is to say, they usually agree similar terms for the documentation when they deal with such transactions. I accept that Mr. Franzese might have supposed that the lawyers' usual terms would reflect the LMA terms, but nothing was said to SP to that effect.

44. In one of his witness statements Mr. Minerva said that Mr. Franzese did not mention standard terms at all. However, in his oral evidence he accepted that Mr. Franzese had said that any deal would be executed on standard terms, without specifying any particular terms. He understood that the lawyers would use whatever standard terms they thought appropriate. He also said that he told Mr. Franzese in March 2005 and possibly thereafter about "the legal issues" surrounding the notes and that Forum's lawyers would be concluding the final agreement on any transfer of the notes.

45. Mr. Pasquali could not remember Mr. Franzese mentioning LMA terms or standard terms. Moreover, although he said that he and Mr. Minerva worked so closely together that they were "familiar with [their] respective conversations with Mr. Franzese", he did not remember being told by Mr. Minerva that Mr. Franzese had said that the trade would be on standard terms.

46. I find that Mr. Franzese did have the conversations with both Mr. Pasquali and with Mr. Minerva that he described. He was an honest witness and he cannot, in my judgement, have imagined them. Mr. Pasquali accepted that his memory about this might not be reliable: if it was mentioned when the parties were far from agreed on price, it would not have seemed important to him. Mr. Pasquali's expertise was in trading bonds, and this was an unusual transaction for him, and it might be that he did not understand something that Mr. Franzese said. There was not, I think, in the end much difference between Mr. Franzese's and Mr. Minerva's evidence about any discussion of standard terms, but if it matter, I would prefer Mr. Franzese's evidence to that of Mr. Minerva, not least because of the difference between Mr. Minerva's witness statement and his oral evidence.

47. There was also some discussion between Mr. Franzese and Mr. Pasquali about when the settlement date might be. Mr. Franzese agreed that this was a matter of some importance to Mr. Minerva and Mr. Pasquali, and they made that clear "a few times". He also said that this was a matter of some practical concern in that GDP needed to obtain the notes from Forum (or rather, I would suppose, from Credit Lyonnais, their custodian trustee). Bond trades (such as the previous deals between Mr. Franzese and SP) tend to settle quickly, within about three days of trading, and Mr. Franzese made it clear to Mr. Pasquali that it would take longer to complete a purchase of these notes. According to Mr. Franzese, he also explained that Bear Stearns would not be able to agree a specific settlement date on trading.

48. On 27 June 2005, Mr. Franzese sent Mr. Held an email asking for a "firm price" that Bear Stearns were willing to pay for the Parmalat notes. He had been asked by SP for a price at which he could make an offer committing Bear Stearns to buy the notes.

49. Mr. Held responded to Mr. Franzese the same morning: he reiterated that Bear Stearns really wanted to buy the notes, but said that Mr. Franzese might have to wait until later in the day to "get you a firm bid". Later that day he gave Mr. Franzese instructions to "indicate" that Bear Stearns would buy the SPA note for 12.5% of the

value of the claims and the BV notes for 18%. This amounted to a payment of €2,774,282.30.

50. On 29 June 2005 Bear Stearns sought further information about the notes and the claims in the administration relating to them. Mr. Franzese, having spoken to Mr. Minerva and at his invitation, directed the questions to Mr. Vecchio of Freshfields. On 30 June 2005 and 5 July 2005 Mr. Stefano Lombrassa replied to Mr. Franzese. He sent Mr. Franzese the notes themselves, and it would have been apparent from the endorsements on them that Forum were not their original holders. It appears that Mr. Minerva kept himself informed about these exchanges: on 5 July 2005 he enquired of Mr. Franzese by email whether he had news from the lawyers about documentation. As Mr. Pasquali explained, it was unusual for a buyer to require documentation of this kind, and it reflected the unusual and relatively complicated nature of trading in Parmalat debt.

51. On 11 July 2005 Mr. Held instructed Mr. Franzese to make a firm bid for the Parmalat debt, subject to Forum's agreement to three conditions:

    i) That they would take any actions that Bear Stearns required to support existing or additional claims in relation to the underlying loans or notes, including transferring the claims into Bear Stearns' name;

    ii) That they would provide financial statements demonstrating their financial worthiness; and

    iii) That they would send a letter to the Italian court, upon Bear Stearns' advice, confirming that they had sold the beneficial interest in the debt to Bear Stearns.

52. In stipulating the first and the third condition, Mr. Held had in mind both the possibility that Bear Stearns might need control over the claims already admitted in the administration and also the plan to bring the late filing claim.

53. On 11 July 2005 Mr. Minerva sent an email asking Mr. Franzese whether there was news about the Parmalat notes. He was, as he acknowledged, very keen to "resolve the matter".

54. Mr. Franzese told Mr. Minerva about the conditions that Bear Stearns required shortly after receiving the email from Mr. Held or, as he put it, "a couple of days before" 14 July 2005. (I accept his evidence that he did so. It was suggested by Forum that I should reject it because he mistakenly referred to an email setting out these conditions that Mr. Held sent on 14 July 2005 as being sent on 11 July 2005. Despite this confusion, I find that Mr. Franzese had spoken to Mr. Minerva about the three conditions by the end of 12 July 2005.)

<u>The evidence about telephone conversations on 14 July 2005</u>

55. The evidence about the telephone conversations between Mr. Franzese and SP on 14 July 2005 is less satisfactory than it might have been. Bear Stearns recorded conversations conducted on Mr. Franzese's land-line telephone, and they included four conversations between him and Mr. Minerva that took place between 13.30 and

15.57. Conversations conducted by Mr. Franzese on his mobile phone, including the call made by Mr. Pasquali in which Bear Stearns say that the deal was concluded, were not recorded.

56. However, the recordings of those telephone conversations between Mr. Franzese and Mr. Minerva are not available. Mr. Franzese's evidence was that he handed the tapes to Bear Stearns' compliance department, but they have apparently been re-used or lost or destroyed.

57. The recordings were still available in October 2005, when Forum told Bear Stearns that they did not intend to proceed with the trade. Mr. Franzese then listened to tapes of all of his telephone conversations on 14 July 2005 that were recorded, and first identified those which were relevant to this matter, noting the times of them in his diary and adding a brief reference to the subject matter. They were conversations between him and Mr. Minerva and, apart from the odd English phrase, they were conducted in Italian: Mr. Franzese wrote these notes in Italian. He then transcribed what was said, noting down the transcription in his diary. He listened to the tape a second time, making amendments and additions to the transcription. Later the same day, he made a final version of this transcription in Italian after listening to the tapes once more, writing this final version not in his diary but in a separate document. Mr. Franzese said that he handed the Italian document to Ms Lynsey Carter of Bear Stearns, but, I am told, it cannot be traced.

58. Mr. Franzese also produced an English version of the conversations on the same day as he prepared the final Italian transcription. That translation is available. However, it is necessary to treat it with some caution: it is not a literal translation but a document that Mr. Franzese wrote with a view to conveying his understanding of the sense of what was said. He departed from the exact words of the conversations. As he put it when explaining one phrase, "I interpreted what I meant". This is particularly strikingly illustrated when an English phrase was used in the conversations and written in English in the diary notes, but different wording is found in the document setting out the English version of the conversations. The diary records Mr. Franzese using the phrase, "Let's give this an end" and this is recorded in the English version of the conversation in the words, "Let's close this".

59. Thus, the documentary evidence that is available about these recorded conversations comprises (i) Mr. Franzese's diary notes of the conversations, which are predominantly in Italian, and (ii) the English version of the conversations made by Mr. Franzese on the day that he listened to the recordings. As far as the former is concerned, there have now been prepared an agreed transcription of the somewhat illegible notes in the diary and an agreed English translation of them. The original recordings and Mr. Franzese's perfected Italian version made from listening to the tapes are not available. They were lost or destroyed by Bear Stearns in circumstances that have not been fully or satisfactorily explained.

60. The position is the more unfortunate because it was only very shortly before the trial started that Bear Stearns disclosed Mr. Franzese's diary, together with a document that was said to be a transcription of the diary notes but which on examination can be seen to depart from what is written in the diary.

61. However, it was not put to Mr. Franzese that he did anything other than seek to record in these documents the true import of the telephone conversations, except that it was put to him that he introduced the words "Let's close it" to which I have referred because they were more favourable to Bear Stearns' case. I would reject any suggestion that he deliberately sought to create misleading documents in order to advance Bear Stearns' case or for any other reason. After all, when he made the English record of the conversations, he did not know that the tapes themselves would not be preserved, as they should have been.

62. In these circumstances, regrettable though it is that, apparently through Bear Stearns' fault, better evidence of the conversations between Mr. Franzese and Mr. Minerva is not available, I must decide the case on the basis of the evidence that is.

The exchanges on 14 July 2005

63. On or before 14 July 2005 Mr. Held increased the amount that Mr. Franzese was authorised to offer for the notes from €2.85 million to €3 million. In the morning of 14 July 2005 Mr. Franzese sent Mr. Minerva an email saying that he would be in touch after lunch when he had been given more information relevant to the proposed purchase of the notes. Mr. Franzese and Mr. Minerva spoke on the telephone at 13.30. Mr. Franzese said that the bonds had lost two points, apparently reflecting the rejection of a claim in the administration. Mr. Franzese said that by 13.45 he should have information from New York so that "we can finalise everything". Mr. Minerva agreed that by this time he and Mr. Franzese were seeking to "finalise everything".

64. At 14.27 Mr. Franzese sent an email addressed to Mr. Minerva in which he stated, "We have a firm bid of Eur 2,850,000. Our FIRM bid will be subject to…", and Mr. Franzese set out the three conditions which Mr. Held had stipulated on 11 July 2005. He continued, "If you agree on the above we will set up a settlement window for the settlement". The email was written in English and a colleague helped Mr. Minerva to understand it. Mr. Minerva understood that a "firm" bid was one to which the buyer was committing himself and to which he could be held if it was accepted, and I find that that is how it would be understood by traders in the market in which Bear Stearns and SP were operating. Upon receiving this email, Mr. Minerva immediately passed it on to Mr. Villa.

65. Mr. Franzese again spoke to Mr. Minerva at 14.43. Mr. Franzese said something to this effect: "Let's close this as soon as possible, you are a very important client for me so tell me from the price that I have shown you tell me what we can do". He said that he wanted to go back to his clients with the price that Mr. Minerva would accept, and tell them, "let's give this an end". Mr. Minerva said that he would not sell at the price of €2.85 million. Mr. Franzese asked whether they could "close" at €2.9 million, and Mr. Minerva said they could not.

66. Mr. Franzese spoke to Mr. Minerva again at 14.47. He impressed Mr. Minerva with the fact that the market had been dropping, making the price that Bear Stearns were offering more attractive, and asked Mr. Minerva to come back with a price that Forum would accept. Mr. Minerva asked whether Mr. Franzese would allow him to check the price "outside": until then Mr. Minerva had discussed the possible sale only with Bear Stearns and he was canvassing the possibility of offering the notes to others. Mr. Franzese agreed that he might do so, but he continued to press Mr. Minerva to make the trade. He said, "Come back to me with a level between 3 and 2.85. If you come back with a level between 3 and 2.85 we will close. So I can close with my trader in New York subject to receiving your docs … accounts, letter that we will write and then you will send it to the court and a letter where you will confirm that you will give us all the informations that you will receive from the court". The reference to "my trader in New York" was to Bear Stearns, and Mr. Minerva so understood it. Mr. Franzese and Mr. Minerva agreed that the last part of the exchange was likely to refer to the conditions that Mr. Held had stipulated.

67. Mr. Minerva said that he recognised the language used by Mr. Franzese as the language of someone making a firm bid and ready to commit himself to a trade. Mr. Minerva was, in his own words, "playing tough", still hoping to achieve a price of €3 million.

68. Mr. Minerva, who was at his office in Switzerland, reported this conversation to Mr. Pasquali, who was in Milan. He told Mr. Pasquali about how the negotiations about the price had developed, and that Mr. Franzese and he had reached an impasse. He also told Mr. Pasquali about the three conditions stipulated by Bear Stearns.

69. Mr. Pasquali then called Mr. Franzese on his mobile telephone. It appears that he did so between 15.27 and 15.36, because Mr. Franzese was taking a call on a landline speaking to a third party when the call came through and that landline call was recorded as taking place between those times. Like Mr. Minerva, Mr. Pasquali spoke with Mr. Franzese in Italian.

70. I shall have to examine in detail the evidence about what was said in this conversation, and shall return to this later in my judgment. However, it is not in dispute –

    i) That Mr. Franzese and Mr. Pasquali agreed upon a price for the notes of €2.9 million.

    ii) That something was said about a settlement date, but no specific date was agreed.

71. Following this telephone conversation Mr. Franzese telephoned Mr. Held and told him that the trade had been "closed" and told him the agreed price.

72. Mr. Pasquali telephoned Mr. Minerva. He said that he had "closed" with Mr. Franzese at €2.9 million, and told Mr. Minerva to speak with Mr. Franzese to see what documents Bear Stearns needed to proceed with the transaction. That, I infer, was a reference to the financial statements required to satisfy the second of the three conditions. Mr. Pasquali also told Mr. Minerva that he had not reached an agreement with Mr. Franzese about the settlement date but he said that it could be three, four or five weeks after the trade date, allowing time for Bear Stearns's lawyers and Freshfields to prepare documents. The matter was now to be passed to the lawyers. According to Mr. Minerva's witness statement, Mr. Pasquali spoke of the matter being passed to the lawyers "to reach an agreement" and for them to "give their legal opinion and approval on the transfer of the notes", but I cannot attach importance to the evidence of the exact words in deciding whether a contract was concluded between Mr. Franzese and Mr. Pasquali: Mr. Minerva's evidence, understandably, was not that reliable about precisely what was said in these conversations.

73. There was a further telephone conversation between Mr. Minerva and Mr. Franzese at 15.56. Both reported that they had spoken with Mr. Pasquali, and Mr. Franzese said, "We have agreed €2.9 million, now we need to speak with your lawyers". Mr. Franzese commented to Mr. Minerva that it was much easier to deal with Mr. Pasquali than with him. Mr. Minerva asked Mr. Franzese to let him have the documents from his lawyers. He therefore made it clear, if it had not already been arranged, that Bear Stearns, rather than Forum, were to have their lawyers take the initiative in preparing the necessary documentation.

74. Mr Franzese also said in this conversation, "Tomorrow morning we will fix a settlement window". According to his evidence, he mentioned the settlement window in this conversation because he knew that Mr. Minerva was concerned about when the deal would be settled, and although he considered that he had concluded the deal without committing Bear Stearns to a time for settlement, he wanted to acknowledge Mr. Minerva's concern. I accept that evidence.

75. According to Mr. Minerva, before the end of 14 July 2005 he and Mr. Franzese had a further telephone conversation because he wanted to know exactly what documents Bear Stearns required. I understand that this was again directed to financial statements required by the second of three conditions. It was Mr. Minerva's evidence that in that conversation they "tackled" the question of when there might be a settlement but they did not arrange anything because they wanted to know how long the lawyers needed to do their work. They said that they would talk the next day to arrange a settlement date.

76. As I have said, I understand Mr. Minerva to have been referring to a further conversation that took place after those that Mr. Franzese had listened to on Bear Stearns' tapes and about which he had given evidence. Mr. Minerva did not mention this further conversation in his witness statements, Mr. Franzese was not asked about it when he was cross-examined, and, indeed, it is not entirely clear that Mr. Minerva was referring to a further subsequent conversation. However, I conclude that there was this further contact between Mr. Franzese and Mr. Minerva after the 15.56 call and before the end of 14 July 2005. The state of the evidence is such that I cannot say why it was not recorded, but it is possible that Mr. Minerva called Mr. Franzese on his mobile telephone (as Mr. Pasquali had done).

77. Although on 14 July 2005 Mr. Minerva and Mr. Franzese spoke of fixing a settlement window the next day, in the event they did not speak on 15 July 2005. Mr. Minerva said that by the end of his discussions with Mr. Franzese on 14 July 2005 they had agreed that three to five weeks should or would be long enough for the lawyers to prepare the necessary documents and that once the lawyers had done so, either the traders would fix a settlement date or, if the lawyers suggested an acceptable date, they would accept it. This is essentially in accordance with Mr. Franzese's evidence that the parties found on 14 July 2005 that they were unable to fix a settlement date and, after discussing it a few times, simply said that the lawyers should find a settlement window. I accept Mr. Minerva's further evidence about the traders identifying or endorsing a precise settlement date within the settlement window, and shall consider its significance later.

78. On 14 July 2005 or thereabouts, Mr. Minerva and Mr. Pasquali reported to Mr. Villa that the maximum price that Bear Stearns would pay was €2.9 million. They also reported that the settlement date was not fixed but that Bear Stearns would agree to a date in August, and that the matter had been passed to Freshfields to conclude an agreement.

Sale to Morgan Stanley

79. While these exchanges were going on between Bear Stearns and SP, Mr. Held was speaking with Morgan Stanley, who were looking for opportunities to invest in Parmalat debt. He reached an understanding with Mr. Riccardo Gastaudo of Morgan Stanley that, if the trade with Forum went ahead, Morgan Stanley should buy from Bear Stearns for €1.5 million half their interest in the notes that Bear Stearns were acquiring.

80. Mr. Held explained in his evidence, and I accept, that this understanding was reached with Morgan Stanley because Morgan Stanley approached him looking for opportunities to invest in Parmalat debt. He responded to the approach not because Bear Stearns were intent on re-selling the notes, but because he valued the business relationship with Morgan Stanley and hoped in this way to enhance it.

81. When Mr. Held was informed by Mr. Franzese on 14 July 2005 that Bear Stearns' bid for the notes had been accepted and the deal concluded, Mr. Held happened to be with Mr. Lars Lemonius of Morgan Stanley, who was, as he was described, Mr. Gastaudo's boss. Mr. Held told him that Bear Stearns had closed with Forum, and then telephoned Mr. Gastaudo to close the sale to Morgan Stanley. The later confirmation documents, one for the SpA note and one for the BV notes, signed by both parties, identified the assets that were sold by reference to a "traded portion" of the notes that Bear Stearns were to acquire from Forum, identifying the notes by their numbers. (The confirmation documents were dated 1 August 2005 but not, according to Mr. Held, exchanged until 16 September 2005. The reason for the delay is not clear.)

82. Mr. Held's evidence was that he regarded the agreement with Morgan Stanley as conditional upon Forum completing the sale to Bear Stearns. I understand that this is a matter of dispute between Bear Stearns and Morgan Stanley, and it is unnecessary and undesirable that I explore that or express any view about it.

The exchanges after 14 July 2005

83. Shortly after 14 July 2005 Mr. Held completed documents called "Distressed Loan Trade Tickets" for both the purchase from Forum and the sale to Morgan Stanley. These were documents prepared for Bear Stearns' internal purposes and were not seen by the counter-parties. Mr. Held described trade tickets as internal documents issued after distressed loans are traded setting out the key points of the trade, such as, among other details, the price of the trade, the proposed settlement date and contact details for the counterparties' representative. He understood the purchase and the sale both to be on LMA terms and completed the tickets accordingly.

84. The two tickets recorded that Bear Stearns were to "do docs" (that is to say, be responsible for documenting the agreement) for both trades. They also recorded "T+20" against "Proposed Settle", which would mean that settlement was to be 20 business days after the date of the trade (the date of the trade, as was recorded on the tickets, being 14 July 2005). Mr. Held explained that, reflecting LMA terms, this settlement date was entered by way of a default option by the computer system through which he completed the tickets.

85. On 15 July 2005 an employee of Bear Stearns recorded trades in what they call their "Wall Street Office Administrator" system. The entry referred to a sale of promissory notes, which is clearly an error. It is suggested by Mr. Buckley that this reflects confusion within Bear Stearns about the notes, and (as I understand the thinking) that this in turn indicates that they had not intended to conclude a contract on 14 July 2005. I am unable to see any such significance in the error. The entry also appears to suppose that the trades would go ahead by way of assignment, but since the form of purchase had been referred to lawyers, I can attach no significance to that either.

86. On 15 July 2005 Bear Stearns received from Ms. Mara Franzetti of GDP copies of the articles of association of Forum, their private placement memorandum and their most recent approved net asset valuation. Bear Stearns accepted this information as fulfilling the second of the three conditions of the purchase that Bear Stearns had stipulated in the email of 14 July 2007.

87. Forum and Bear Stearns both instructed lawyers to deal with the necessary documents. Forum instructed the Milan office of Freshfields. Bear Stearns instructed Mr. Pigott of Mandel in New York. They also engaged Allen & Overy's Italian office to deal with the late filing claim.

88. On 18 July and 20 July 2005 Mr. Franzese reminded Mr. Held about sending the "contract" to Forum, probably because Mr. Minerva had been chasing him. On 25 July 2005 Mr. Franzese sent an email to Mr. Minerva saying that Bear Stearns would be sending a document to Freshfields that day and would send copies to him. Mr. Minerva acknowledged this without apparent concern about the matter being urgent or about any delay.

89. On 19 July 2005 Forum's auditors, KPMG, contacted Freshfields and asked for confirmation that the notes existed, that Forum owned them and of their value. Mr. Lombrassa responded to KPMG, writing at the end of his email, "We are negotiating, on behalf of Forum, the selling of the above credits to Bear Stearns International

Limited. At present, Bear Stearns International Limited had not confirmed the purchase of the credits yet". Again on 29 July 2005 he wrote to confirm that "both the credits of Forum Global Equity Limited vis-à-vis Parmalat SpA and Parmalat Netherlands BV … are going to be sold to Bear Stearns International".

90. On 1 August 2005 Freshfields received from Bear Stearns two documents by way of LMA Trade Confirmations, one relating to the SpA note and the other relating to the BV notes. They were sent under cover of an email asking whether Freshfields had any comments. They stated, "We are pleased to confirm the following transaction, subject to the Standard Terms and Conditions for Distressed Trade Transactions of the Loan Market Association ("LMA") as in effect on the Trade Date, which are incorporated by reference". The trade date was stated to be 14 July 2005. The Settlement Date was "as soon as possible". The form of purchase was "Funded Participation using LMA standard form of Participation Agreement for distressed trades". The transaction documents were to be prepared by the seller.

91. The confirmation documents contained an error in that a box was ticked that indicated that the notes were secured. There was some suggestion that this reflected that the details of the trade had not been fully worked out and that in turn this indicated that there had been no intention on 14 July 2005 to conclude a contract. I am unable to attach this, or any, significance to this error.

92. The confirmation documents, being sent by email, were not signed by Bear Stearns. They were described by Mr. Villa as a "proposal" and by Mr. Lombrassa and Mr. Buckley as "draft documents". Clause 3 of the LMA terms contemplates that a confirmation will be signed by the party responsible for preparing it, and sent no later that the second business day after the trade date. Nevertheless I do not so regard the confirmations as being merely proposals or draft documents if that connotes that they indicated that no deal had been concluded. They were described in the email under cover of which they were sent as "confirms", and it seems to me that on their face they confirmed an agreement made on 14 July 2005. Admittedly in the email Bear Stearns invited comments upon the confirmations, and at the end of the documents themselves Bear Stearns asked to be notified within one day of any disagreement with the terms set out. However, that simply reflected the usual procedure when traders use an LMA confirmation to record a concluded deal. I add that neither these documents nor any other correspondence between the lawyers bore any annotation that they were sent "subject to contract" or with any comparable annotation.

93. When he saw the confirmation documents, Mr. Lombrassa was surprised both about the reference to LMA terms and conditions and because the proposed structure for the transfer was by way of funded participation. He responded on 4 August 2005, pointing out that the documents appeared to refer to the transfer of distressed debt under credit agreements (because he regarded funded participation agreements as directed to transactions of that kind), whereas the "credits/claims" to be transferred related to amounts assessed by the Court of Parma in respect of the notes and guarantees. He commented, "The LMA Documents' structure does not seem to perfectly fit into the transaction entered into by [Forum] and [Bear Stearns]" and "It might be opportune to consider amending the LMA Documents to reflect the different nature of this transaction". He also pointed out that Forum's warranties needed to be limited so as to reflect that Forum were not the original holders of the notes. Mr.

Lombrassa did not comment upon the statements in the documents sent by Bear Stearns that they were confirming a transaction that had already been made and that the trade date was 14 July 2005.

94. Among his other comments, Mr. Lombrassa asked that the settlement date be specified as 20 August 2005. As he explained in his evidence, he regarded himself as working to a deadline of the third week of August 2005 for agreeing and completing the transaction. The significance of this date to his mind was that the notes were to be converted into shares in new Parmalat SpA, which would end speculation about the value of the claims, and it was rumoured, and Mr. Lombrassa believed, that the conversion would take place in late August or early September. He did not explain this to Mr. Pigott or to Bear Stearns. It is to be noted that Mr. Lombrassa apparently did not believe, and had not been instructed, that Freshfields should be working to complete the documents by any specific time as a result of anything agreed or discussed between the parties, and apparently he did not seek to introduce the reference to the third week of August 2005 into the documentation because Freshfields were to agree a settlement window with Bear Stearns' lawyers.

95. Around this time, on 2 August 2005, there were exchanges by email between SP and Mr. Franzese. (It is not clear from the evidence whether it was Mr. Pasquali or Mr. Minerva who was corresponding for SP: when cross-examined each of them believed that they were his own emails. It is not important to resolve this curiosity, but I think that it was probably Mr. Pasquali, because I thought convincing his evidence that he recognised the style of emails as his own.) SP asked why they had not received an update about the discussions between the lawyers and about the settlement date, explaining, "We need to insert the transaction in the fund", and asking Mr. Franzese to let them "know something about this as a matter of urgency". Mr. Minerva explained in his evidence that Forum needed this information in order to value the fund. Mr. Franzese replied that the lawyers were in discussions. SP responded that Mr. Franzese should have let them know about the settlement of the transaction and wrote, "You told me third week of August". Mr. Franzese replied, "We're trying to do it for the third week but we must be more secure before we confirm". Mr. Minerva commented that he was happy with that response because the settlement depended upon how long the lawyers took to prepare the documents.

96. I make these observations about these exchanges. First, the stated reason that SP wanted to know the settlement date is not because they wanted to conclude a contract but "to insert the transaction in the fund", which, as I have said, referred to a need to value the fund. It would be rather surprising, if SP did not believe that a contract had already been concluded, that this was their priority. I consider that Mr. Christopher Harrison, who represented Bear Stearns, was justified in submitting that the communications did not really convey the sense of the urgency that would be expected if the contract had not been concluded and did not convey that there was any urgency at all for any reason other than valuation purposes. Although Mr. Pasquali said in evidence that he was "getting nervous" about there being no concluded contract, I do not detect this from the messages that SP were sending. Mr. Lombrassa's evidence was that "the reason for the hurry of the client" was the need to ascertain the net asset value of the fund, and I accept that. Secondly, SP requested that Mr. Franzese tell SP when the transaction would be settled. They do not appear to have contemplated that the parties needed to discuss and agree about this. Thirdly,

although SP asserted, "You told me third week of August", Forum did not suggest that this was a commitment of a contractual nature, either by way of a term of a contract that had been made or of a contract that was to be made. SP were referring, I infer, to what Mr. Franzese had said about when he expected or hoped that there would be settlement.

97. Having sent his comments on the proposed documentation on 4 August 2005, Mr. Lombrassa went on holiday for three weeks, but while he was away he kept in touch with the office on a daily basis. He did not hear further from Bear Stearns about the transaction until 31 August 2005. Despite Mr. Lombrassa's "deadline" of 20 August 2005, Freshfields do not appear to have pursued the matter with any urgency during Mr. Lombrassa's absence, apart from mentioning in an email of 10 August 2005 that they were awaiting comments in respect to Mr. Lombrassa's observations of 4 August 2005. They also sought in that email Bear Stearns' indications about how they should vote on a proposal of composition with creditors under the Extraordinary Administration of the Parmalat group.

98. There are no records of emails between SP and Mr. Franzese between those of 2 August 2005 and 14 September 2005. I accept Mr. Minerva's evidence that he was in touch with Mr. Franzese during this period both by email and on the telephone, and I accept that SP were seeking to have Bear Stearns progress the matter. However there is no evidence that I accept that SP conveyed any sense of urgency or anxiety about this. Mr. Villa said that SP phoned Mr. Franzese "very often" to ask him to close the deal and that Mr. Franzese sent "reassuring messages" that the deal would be settled within three days or within a week. Mr. Villa said at one stage in his evidence that Mr. Franzese had said that as early as July, although he later seemed uncertain of this. At all events, I found this evidence of Mr. Villa unconvincing. I consider that the truer picture is that given by Mr. Minerva, who said that after 14 July 2005 he continued to speak to Mr. Franzese but, while mention was made of the notes, he did not have "any specific discussion" about them because the matter was in the hands of the lawyers.

99. During August 2005 Bear Stearns took steps to pursue the "late filing claim". Although Bear Stearns had retained Allen & Overy's Italian office to deal with it, Mr. Pigott was instructed to prepare a letter of indemnity that was to be provided to Forum by Bear Stearns because the application had to be made in Forum's name. He sent a draft letter of indemnity to Mr. Curto of Freshfields on 24 August 2005. On 25 August 2005 Mr. Curto said that he was content with the draft. The letter of indemnity was signed by Bear Stearns, and Freshfields confirmed that Allen & Overy might file the claim.

100. The letter of indemnity, both in draft and in its final version, started with the statement, "Reference is made to the trades dated 14th July 2005 between [Forum], as seller, and [Bear Stearns], as buyer, (collectively, the "Trades")." It said at the end, "This letter agreement shall in no way be deemed to modify the mutual obligations of the parties hereto with respect to the Trades which obligations shall remain unmodified and in full force and effect". Freshfields did not question this phraseology.

101. On 25 August 2005, in the same email in which Mr. Curto said that Freshfields were content with the draft of the letter of indemnity, Mr Curto also said that they looked forward "to formalizing the transfer agreement as soon as possible, hopefully in the next few days", and reminded Mr. Pigott that they awaited his reply to Mr. Lombrassa's comments "on the draft of the agreement". This must have been a reference to the forms of confirmation sent by Bear Stearns on 1 August 2005.

102. Mr. Pigott responded on 25 August 2005 that he was working on re-drafting the transfer agreements and would "get drafts out during the course of tomorrow realistically with a view (allowing for negotiation of the issued (sic) raised) to closing early next week".

103. On 31 August 2005, Mr. Pigott sent to Freshfields an email attaching "a draft confirmation and LMA participation agreement" relating to the BV notes, commenting that, once they were agreed, they could be adapted to draft an agreement relating to the SpA note. He pointed out that the drafts remained subject to review and comment from Bear Stearns. The draft documentation contained errors in a heading "Morgan Stanley Emerging Markets, Inc" and a reference to a trade date of 7 June 2005. Mr. Pigott also repeated the mistake in the confirmation by indicating that there was security for the notes. The draft agreement showed that Mr. Pigott still contemplated that the deal would be completed by way of a funded participation rather than a transfer.

104. Mr. Curto acknowledged the documents the same day, saying that Freshfields would go through them and come back to Mr. Pigott. Mr. Lombrassa's evidence was that he was surprised that the draft documentation still referred to LMA terms, was based upon a funded participation arrangement and, despite the comments in his email of 4 August 2005, did not limit the warranties to reflect that Forum were not the original holders of the notes. On 2 September 2005 Mr. Lombrassa sent an email about the transaction being structured on the basis of a funded participation arrangement, writing "We would be grateful if, following your review of the notes documentation and proofs of claim, you could let us know whether you still believe that participation is the best way to deal with this under English law and briefly explain in writing your reasons why so that we can discuss the issue with our client".

105. Both Mr. Pigott's letter of 31 August 2005 and Mr. Lombrassa's response of 2 September 2005 reflect that the lawyers understood that the drafts passing between them were to be discussed with their respective clients. Mr. Pigott confirmed that, as he understood it, the lawyers were to reach an understanding to which their clients were to agree.

106. On 14 September 2005 there was a further exchange of emails between Mr. Franzese and SP. Mr. Franzese wrote that they were very close to settlement. SP replied that Mr. Franzese had to let them know the exact settlement date, and Mr. Franzese said that he would be in touch that week. Again the tone of the exchange was that the parties expected that Mr. Franzese would simply inform SP when there was to be settlement, not that it was to be a matter for negotiation between the parties.

107. Around this time there was also further discussion between Mr. Pigott and Freshfields about the structure of the transaction. Mr. Pigott argued that a structure based on a

funded participation was needed because the notes had been issued without trustees and therefore the claims had been filed and admitted in the Parmalat administration in the name of Forum. In an email dated 14 September 2005 he confirmed to Freshfields that there were no trustees of the notes. However, on 19 September 2005 Freshfields provided comments on some of the documentation sent on 31 August 2005 and again said that they would "like to understand the reasons for using the LMA Funded Participation as opposed to a straight assignment (eg the LMA Assignment Agreement duly modified and amended)". They also provided what they described as their "mark-up of BS [Bear Stearns'] Confirmation", and the "mark-up" reflects their preference for an assignment. It contemplated a settlement date in September 2005. Bear Stearns suggest that the wording of Freshfields' comments reflects their understanding that a contract had already been concluded between Bear Stearns and Forum, drawing attention to the reference to "the transaction entered into by Forum and BS". For my part, I cannot attach such significance to this phraseology.

108. On 21 September 2005 Mr. Pigott reiterated to Freshfields the difficulty that he saw in completing the transaction by way of an assignment rather than funded participation, writing, "We have been advised by our Italian counsel that it is not possible to effect a transfer of record with respect to these claims, ie a transfer which would be recognized and recorded by the Italian court with the effect that the transferee would be recognized by the court for all purposes as the legal owner of those accepted claims… The claims with respect to the notes were in fact filed ... in the name of the holder; given that the record holding of the claims cannot be transferred at the court, the only way the economic benefit of the claims can be transferred is by a participation".

109. On 22 September 2005 Mr. Pigott sent a further marked-up copy of the trade confirmation, and asked Freshfields to review the draft of the LMA Funded Participation Agreement sent on 31 August 2005. On 27 September 2005 he sent an email stating that he had heard that it was expected that the distribution of shares in the Parmalat insolvency might be "as early as next week", and asked for Freshfields' comments as soon as possible with a view to the agreement being signed that week. The proposed documentation was still based upon LMA terms and the proposed warranties still did not reflect that Forum were not the original holder of the notes.

110. Freshfields sent their comments on the documents on 5 October 2005, including their comments on the draft terms and conditions. These were based on the LMA terms. The changes requested by Freshfields reflected, among other things, that Forum were not the original holders. It is of some interest that they did not amend the provision in clause 2 of the LMA terms that provided that a binding agreement should come into effect upon oral agreement of the terms on the Trade Date (although they proposed a minor drafting amendment to that clause).

111. As they noted in their covering email, Freshfields proposed that the agreement include a provision that the transfer price should be no less than €2.9 million, net of any expenses, costs, tax or fees, the expenses of the transaction being paid by Bear Stearns.

112. Mr. Pigott acknowledged these comments on 6 October 2005, commenting that on a preliminary review Freshfields' comments "look fine" and that Bear Stearns would

like "to close this as soon as possible". He sent revised copies of the documentation to Freshfields on 11 October 2005.

113. Freshfields responded to the revised draft on 12 October 2005. They again emphasised that the settlement amount should be at least €2.9 million, describing this as "a highly sensitive point" and commenting that they "understand that the commercial agreement is that our client should receive at least €2.9 million from the sale of all the notes …net of any tax, cost and expense". They also reiterated the need for the warranties to reflect that Forum were not the original holder of the notes.

114. By this time, the arrangement for issuing shares in the new Parmalat SpA had been approved by the Court on 1 October 2005 and the shares had been issued on 6 October 2005 and listed on the stock exchange. At one point in his cross-examination, Mr. Lombrassa insisted that he did not know of this when he wrote on 12 October 2005, but I understood him eventually to accept at least that he was unsure about whether or not he was so aware. In any case, I find that he did know that the composition had been approved and the shares issued: in his email he wrote, "Please insert reference to non cash distribution given that the composition on creditor has been approved…".

115. On 14 October 2005 Mr. Pigott sent to Freshfields pricing letters confirming what was to be paid for the SpA note and the BV notes. The pricing letter for the BV notes contained an error, which was apparent on its face, in that it indicated a price of €552,535.72, rather than €541,340. The price for the SpA note was shown to be €2,358,660. I do not consider the obvious error in the pricing letter for the BV notes to be of any significance (and I do not understand Forum to suggest that it is). On any view, it was clear that Bear Stearns were intending to pay at least the agreed price of €2.9 million. Mr. Pigott also recognised the need to change the warranties to reflect how Forum acquired the notes, having apparently previously misunderstood the position.

116. Meanwhile on 13 October 2005 there was a further exchange of emails between Mr. Franzese and Mr. Minerva. Mr. Franzese wrote that he thought that "the Parmalat story would end today".

Forum withdraw from the trade

117. However, before Mr. Pigott and Freshfields had reached final agreement upon the documentation, on 21 October 2005 Mr. Vecchio and Mr. Lombrassa wrote to Mr. Pigott that Forum had decided "not to proceed with the execution of the Documents of the Transaction". They stated that the "transaction should have been settled in the period of time between the last week of August 2005 and the first week of September 2005 (the Window Time)", and that the purchase price should have been paid by Bear Stearns to Forum before the end of the first week of September 2005. Forum's stated reasons for their decision were "mainly" that:

i) The purpose of the transaction was to transfer risk in relation to the Parmalat debt and therefore had to be executed and completed within the "Window Time";

ii) Bear Stearns did not pay the purchase price before the end of the "Window Time"; and

iii) Forum and Bear Stearns had not reached an agreement on the documents, despite the good faith of Forum.

Forum do not contend in these proceedings that any of these reasons would have justified them in withdrawing from a concluded contract.

118. On 26 October 2005 Bear Stearns responded to the letter, refuting that Forum had any right to "cancel the Trades" and stating that they remained ready, willing and able to settle them. On 27 October 2005 Freshfields told Bear Stearns by email that they were no longer acting for Forum.

119. On 11 November 2005 Messrs. Simmons & Simmons, acting for Bear Stearns, wrote a letter before action to Forum, giving notice of Bear Stearns' intention to bring proceedings for "specific performance, alternatively damages arising out of your breach of contract in failing to settle a trade closed with the Bank on 14 July 2005…". These proceedings were brought on 23 December 2005. Bear Stearns claimed specific performance of the contract to sell the notes that they alleged had been made on 14 July 2005, with further or alternative claims for damages and other relief. The particulars of claim of the same date state that the notes had come to be represented by shares in new Parmalat SpA, and that Bear Stearns believed that the notes were represented by 2,338,476 shares, "being 1,692,386 shares receivable immediately together with a further 646,090 conditional upon acceptance by the Italian court of a late filing claim".

120. The proceedings were served on Forum in the British Virgin Islands, and Forum responded by challenging the jurisdiction of the English court, and serving evidence in support of their application. It was dismissed by Mr. Justice Cooke on 23 June 2006.

121. In the meanwhile, Forum had been selling the shares in new Parmalat SpA that they had received as holders of the notes. They made a first sale of 392,387 shares on 21 October 2005, the day upon which Freshfields advised Bear Stearns that Forum were not proceeding with the transaction. A further 600,000 shares were sold later in October 2005 and in December 2005. Forum did not inform Bear Stearns of these sales, and did not mention them in the course of the application challenging the jurisdiction. The remaining shares were sold on 26 and 28 July 2006. On 4 August 2006 Forum, through their solicitors, Masseys LLP, advised Bear Stearns of the sales.

122. In response to this information, by letter dated 23 August 2006 Simmons & Simmons wrote to Masseys LLP, the solicitors representing Forum in this litigation, in the following terms:

> "You recently advised us for the first time that your client had sold its entire holding of shares (excepting only those shares yet to be released by the Milan courts). You had previously advised us that your client retained the shares. We reserve all our client's rights in relation to the sale(s), which (as will have been appreciated by your client) deprives our client of the

> possibility of the contract between our respective clients being performed. In the circumstances our client may now have no choice but to accept your client's repudiation of the contract and to confine the relief it seeks to compensatory damages for repudiatory breach. Please could you provide us with evidence of the share sale(s) and confirm the date and prices of the sale(s)."

(I should state, lest there be any doubt, that there is no suggestion that Masseys LLP are to be criticised in any way for giving misleading information or for withholding information about the share sales.)

123. On 24 August 2006 Masseys LLP sent Simmons & Simmons details of the share sales.

124. On 13 September 2006 Simmons & Simmons sent to Masseys LLP an amended pleading of Bear Stearns' claim and enquired whether Forum consented to the amendment. In it Bear Stearns averred that they were unaware of the share sales before 4 August 2006, and that because of the share sales Forum had deprived them of their claim for specific performance. They claimed only damages (apart from prayers for further or other relief and costs). The amended pleading was formally served on 27 September 2006.

125. Mr Harrison submitted that Bear Stearns elected to terminate their contract with Forum by Simmons & Simmons' letter of 23 August 2006 or alternatively when they sent the proposed pleading on 13 September 2006. I am unable to accept that submission.

126. Admittedly Simmons & Simmons stated in their letter that Bear Stearns had been deprived of "the possibility of the contract … being performed", but an election must be clear and unequivocal. Given that in the same letter Simmons & Simmons expressly reserve all Bear Stearns' rights, state that Bear Stearns *may* have no choice but to accept the repudiation and call for evidence of the share sales, I cannot read the letter as a clear and unequivocal statement that Bear Stearns were treating the contract as terminated.

127. Nor do I consider the amended pleading clearly and unequivocally evinces an intention to terminate the contract. A decision not to pursue a remedy of specific performance does not commit the innocent party to accept a repudiatory or anticipatory breach. He is entitled to claim other relief, including damages for the breach, and at the same time maintain the contract.

128. It was Mr. Held's evidence that he realised that Forum could not deliver the shares in new Parmalat SpA only after being informed of the share sales on 4 August 2006. He acknowledged that in October 2005 Bear Stearns could have gone into the market and bought shares in new Parmalat SpA, but said that Bear Stearns did not do so because nobody seriously believed that Forum would not settle the trade. The point of the transaction, he said, was to buy the loans so as to realise a profit when the claims were converted into shares and to realise the additional value of the late filing claim.

129. Mr. Held also gave evidence that Bear Stearns had adopted a long term strategy in relation to investment in the Parmalat group and by October 2005 had built up a portfolio of Parmalat debt that converted into about 8 million shares. He explained that although Bear Stearns sold some of their investment upon the conversion into shares, they subsequently started to buy back shares and retain a substantial holding of about 5.5 million shares. He said that he believes that if Bear Stearns had received the shares that they bought from Forum, they would still be holding half of them, having sold the rest to Morgan Stanley.

130. I accept this evidence of Mr. Held about his own and Bear Stearns' thinking in response to the letter of 21 October 2005 and their investment strategy. I shall have to consider later whether Bear Stearns' conduct was reasonable.

The Conversation between Mr. Franzese and Mr. Pasquali

131. I return to the conversation between Mr. Franzese and Mr. Pasquali on 14 July 2005.

132. Mr. Franzese's evidence was that the focus of the conversation was the price that Bear Stearns were to pay. Mr. Pasquali and he agreed a price of €2.9 million, and, according to Mr. Franzese, they "closed" the trade. Mr. Pasquali did not stipulate or even suggest any terms or conditions. Mr. Pasquali then asked about a settlement date, but they could not set a specific date because that depended upon how long the lawyers would take to document a transaction. Mr. Pasquali suggested that there might be a settlement window: Mr. Franzese recounted this part of the conversation in his cross-examination as follows: "… he said, what about the settlement window? And I said: Paolo, I don't know, because this is lawyer which they need to agree on the documentation. And he was: Will be roughly August, stuff like that? I said, I was like I'd never give him a firm commitment on a settlement window". There was some mention of the third week of August in that Mr. Pasquali tried to "indicate to me" that week, but Mr. Franzese said "there are legal documents and I cannot tell you when it is". Mr. Pasquali asked Mr. Franzese whether he could agree the settlement window with Mr. Minerva, and Mr. Franzese said that he would do so.

133. Mr. Franzese's evidence was that he could not give any commitment to a settlement window because he did not know how long the lawyers would take. He agreed with Mr. Pasquali to speak to Mr. Minerva with a view to reaching some agreement or understanding about when the settlement would take place but that arrangement was not, according to Mr. Franzese, "part of the trade".

134. Mr. Pasquali's evidence about this conversation was that in a short discussion about price he realised that Mr. Franzese would not pay €3 million and so they agreed to proceed on a price of €2.9 million. He then raised the question of the settlement date. I did not find Mr. Pasquali's evidence about this easy to follow and it was not, I think, entirely consistent. However, I understand the effect of his evidence by the end of his cross-examination to be this: that Mr. Franzese had said that Bear Stearns were not then in a position to fix a settlement date because the lawyers had some complicated work to do. Mr. Pasquali said that he wanted to be able to tell Mr. Villa something about when the trade would settle and that, if they could not decide upon a settlement date, he proposed that they discuss a settlement window. I understand that in this

context he proposed that it might be the third week of August 2005, but he did not say that Mr. Franzese agreed to that.

135. As I see it, there is no fundamental contradiction between the accounts of the two witnesses. In so far as there is a difference between them, I prefer the evidence of Mr. Franzese. This is partly simply because of the impression that I formed of the two witnesses, but also because Mr. Pasquali's oral evidence departed significantly from what he had said in one of his witness statements. There he had said that, although no specific settlement date was agreed, he agreed with Mr. Franzese that the settlement date would be fixed within a "settlement window" ending in the third week of August (that is to say, by the week ending 19 August). (I also observe that in their pleaded case - before they amended it during the course of the trial after Mr. Pasquali had given evidence - Forum asserted that during the telephone conversation Mr. Pasquali had advised Mr. Franzese that the contract would have to be entered into and payment received "within August 2005" and this had been agreed. However, since Mr. Pasquali was not cross-examined about this, I leave it out of account when assessing his evidence.)

136. I conclude that in the telephone conversation Mr. Franzese made it clear that he was not in a position to commit Bear Stearns to any specific date or period for the settlement of the transaction, and that the question of when any transaction might be completed depended upon how long the lawyers required to prepare the necessary documentation. The further discussion about settlement was conducted against this background. Mr. Pasquali sought from Mr. Franzese some indication about when there would be settlement so that he could tell Mr. Villa something about that. Although the third week of August 2005 was mentioned, Mr. Franzese and Mr. Pasquali did not contemplate that the parties should be contractually committed to that date: they were simply discussing when Forum might expect the documentation to be completed so that settlement might take place. The matter was left between Mr. Franzese and Mr. Pasquali on the basis that this would be further discussed between Mr. Franzese and Mr. Minerva, but, as I conclude, that further discussion would be on the same basis: the purpose of the further discussion was for the parties to understand better when they might expect settlement to take place, rather than with a view to binding themselves to a contractual commitment to settle on a specific settlement date or within a specific period. It is, I think, significant that Mr. Villa's evidence was that, "When the price was agreed, this settlement window was *indicatively* set between the last week of August and the first week of September": he was told this by Mr. Pasquali or Mr. Minerva, and while I do not accept that in fact Mr. Franzese said that he expected settlement during this period, this reflects the true nature of this part of the discussion.

137. In reaching this conclusion I do not overlook the evidence that earlier in the negotiations SP had made it clear that the settlement date was of importance to them and to Forum. However, Mr. Franzese for his part made it clear that Bear Stearns simply were not in a position to give a commitment about that. Nor do I overlook that, in his conversation with Mr. Minerva after speaking to Mr. Pasquali, Mr. Franzese said that tomorrow "fissiamo" a window of settlement, a word that he himself translated (in the translation designed to convey his intended meaning), "We will fix a settlement window". However, I am unable to accept that because he used that expression Mr. Franzese was indicating, despite insisting that he would not

commit himself to a specific time for settlement, that he proposed to agree a contractual term about settlement, or that he would have been so understood.

138. The conclusion that I have reached about the conversation between Mr. Franzese and Mr. Pasquali finds, I think, some support in the fact that after 14 July 2005 the parties did not attempt to negotiate a settlement date but left it to the lawyers to go about preparing the documents, and in so far as the matter was raised by SP, they were looking for information from Mr. Franzese about when there would be settlement and were not seeking to negotiate a date upon which the parties were to agree (as would be expected if they had deferred this part of the negotiations on 14 July 2005).

139. Nothing was expressly said in the discussions between Mr. Franzese and Mr. Pasquali about the three conditions that Bear Stearns required. However Mr. Franzese had already made SP aware of this requirement and had confirmed it in his email on 14 July 2005. Mr. Pasquali, as well as Mr. Minerva, was aware of the three conditions. It was clear that any deal would be subject to them.

The authority of Mr. Pasquali and Mr. Minerva to enter into the contract

140. At the start of the hearing, Forum were contending that Mr. Pasquali and Mr. Minerva did not have authority to conclude the sale of the notes on their behalf. It became clear in the course of the evidence that that argument could not be sustained, and Forum rightly abandoned it. The issues are whether any agreement was merely an agreement to agree, whether any agreement was sufficiently certain to be contractual and whether the parties intended to make a contract. Before coming to those questions, it is convenient to deal with an issue between the parties as to whether or not any agreement was upon LMA standard terms.

Incorporation of LMA terms

141. Bear Stearns contend that they agreed with Forum that they should acquire the notes upon the LMA terms. They put forward this contention on two bases. First, they say that Mr. Franzese had agreed in his discussions with SP before 14 July 2005 that any transaction would be on "standard terms" and this is to be interpreted as a reference to the LMA terms. Secondly, they say that in any event the LMA terms are to be implied into any agreement because of a usage or custom of the market in which Bear Stearns and SP were operating.

142. Forum deny that the parties were discussing a transaction which would (expressly or impliedly) incorporate the LMA terms. They dispute that Bear Stearns have established a proper basis for their incorporation, and also argue that the LMA terms do not apply to a sale of instruments such as the notes and that the LMA terms themselves provide that they will not be introduced into a contract in the way that Bear Stearns contend.

143. The reasons that Bear Stearns are concerned to argue that the LMA terms were incorporated, as I understand it, are that, in so far as it is contended that their agreement with Forum was too uncertain to be given contractual effect, the LMA terms supplement the terms specifically agreed and so provide further certainty, and with regard to the question whether the parties are to be taken to have intended to enter into a legally binding contract, Bear Stearns rely upon clause 2 of the LMA

terms, which contemplates that the parties will be contractually bound upon their oral agreement. As I shall explain, in my judgment Bear Stearns do not need to rely upon the LMA terms to establish that they entered into a concluded contract on 14 July 2005, and the case does not turn upon whether the parties intended to incorporate the LMA terms.

144. I am not persuaded that anything was said in the exchanges between Mr. Franzese and SP that could properly be understood to give rise to an agreement that the LMA terms were to be incorporated. I accept that if the parties had agreed that they should adopt standard terms used in the market for documenting a deal such as theirs, then the evidence is that there was no set of standard terms to which they could have been referring other than the LMA terms. As Mr. Tucker put it, and as I accept, "If "standard terms" were agreed to apply, that could, realistically, only have meant LMA standard terms". However, when Mr. Franzese was speaking to SP about "standard terms", he indicated not that the parties would adopt a standard set of terms used in the market but that the lawyers would draft the terms, and he reassured SP that lawyers would be able to use terms that were "pretty standard", that is to say, that the lawyers would not have to draft a document from scratch but would have readily available wording that they commonly use for transactions of this kind.

145. Nor am I persuaded that the LMA terms are to be incorporated because of a usage or custom. In order for terms to be implied into a contract on this basis, it is not sufficient that there be a mere trade practice, but there must be a usage or custom that is notorious, certain and reasonable: Chitty on Contracts, 29th Ed (2004) Vol. 1 at para 13-018.

146. In my judgment there was no convincing evidence of a notorious and certain usage or custom that LMA standard terms should apply to sales of any kind of note or instrument. The LMA terms stated that they applied "to a distressed trade transaction in respect of which they are incorporated by reference". Admittedly Mr. Tucker gave evidence that the terms were not used only when they are adopted expressly at the time of the trade, but at most his evidence showed that in July 2005 the market often used the LMA terms when trading distressed debt and not that there was a usage or custom such as is required for the implication of contractual terms. Indeed in 2004/05 the LMA set up the committee to harmonise stressed and distressed loan documentation because some American investors were looking to apply LSTA terms when trading in European assets.

147. Moreover, the LMA terms were not designed to be incorporated wholesale into any contract. In early 2006 the LMA produced a revised Users Guide to elucidate the revised version of their standard terms of October 2005, and this emphasised that, "For the avoidance of doubt, the documents referred to in this guide are non-binding recommended forms of distressed trading agreements and their sole intended purpose is to be used as a starting point for negotiation….". Although this User Guide was not published until after July 2005, as Mr. Tucker explained, the changes in the LMA terms and documentation had been under discussion for some time and were designed to reflect existing practice in the market. Even if it was understood in the market that the LMA terms should be used as the basis for discussion about the terms of a transaction, that does not amount to an understanding that a specific set of terms should be included in a contract.

148. Even if I were satisfied that there is a usage or custom whereby the LMA terms are implied into sales of some instruments, I would not have concluded that it applied to a sale of the notes.

149. There was much debate between the experts about what kind of instruments the notes were, whether they were bonds or loans. However, it is common ground between the expert witnesses, and I accept, that before the claims were made in the administration the notes could have been traded in the manner of a bond and deals could have been settled through bond clearing systems if the bonds were held by a common depositary. Given that there were no trustees of the instruments and that the claims were in the name of Forum, they certainly could not have been so traded afterwards.

150. But none of this, it seems to me, assists Bear Stearns to establish that the usage or custom for which they contend would apply to the notes. I am inclined to agree with them that these instruments were never truly of the nature of bonds. I also agree with them that, once the claims were admitted in the administration, trading in the instruments amounted in commercial reality to trading in the claims, and fell within the definition of a "distressed trade transaction" in the LMA terms. However this part of Bear Stearns' case is defeated by the evidence of Mr. Buckley. He was actively involved in the market at the relevant time, and it would not have occurred to him to buy or sell the notes on the LMA terms. At the risk of oversimplifying his reasoning, it was along these lines: the assets that were being traded in this case were instruments that had characteristics associated with bonds, such as fixed coupons, and, before the Parmalat group went into administration, they would have been traded in the manner of bonds. He would not have expected that the way in which the notes were traded would be affected by the fact that the group had gone into administration and the holders of the notes had made claims, and that therefore the value of the instruments lay in the value of the claims. As he understood it, it was never intended that LMA terms should be used to trade claims derived from instruments with the characteristics of bonds. Given the unusual nature of the notes and the claims to which they gave rise, it is hardly surprising that there was no established practice as to how they were traded. Certainly I conclude that there was none.

151. I add that I reach this conclusion without relying upon the evidence that Bear Stearns had not adopted the LMA terms when they had previously dealt in distressed Parmalat assets. It suffices to say that there were proper grounds for distinguishing between those trades and the dealing between Bear Stearns and Forum.

<u>Did the parties make an "agreement to agree"?</u>

152. Although there is no dispute that on 14 July 2005 the parties agreed upon the price that Bear Stearns would pay and Forum would accept for the notes, Forum dispute that they made any binding contract. They put forward three (distinct but inter-related) arguments:

i) that the parties agreed to defer reaching an agreement about when there should be settlement and therefore deliberately agreed to defer concluding a contract.

ii) that the agreement was too uncertain to be an effective contract.

iii) that the parties did not intend to create legal relations.

153. The basis of the first argument is that the parties did not simply fail to discuss when the sale should be executed, but they deferred reaching an agreement about this to another occasion. Thus Mr. Paul Greenwood, who represents Forum, submits that the parties agreed to make a contract in the future, and in such cases as May & Butcher v R, [1934] 2 KB 17n it has been recognised that an agreement is not contractually concluded if it leaves significant matters subject to the parties' future agreement. He supports this argument with the evidence that those representing Forum regarded the settlement date as an important matter.

154. For the reasons that I have explained, I do not accept that the parties arranged that Mr. Franzese have further discussion with SP about the settlement date in order that they might then make a binding commitment to it and so to complete their contract, but only with a view to having a better understanding about when the parties might expect settlement to take place. Mr. Franzese had made it clear that he would not make a contractual commitment on behalf of Bear Stearns that settlement would take place on or by a specific date.

155. This in itself answers this part of Mr. Greenwood's argument, but in any case, as Lloyd L.J. said in Pagnan SpA v Feed Producers Ltd, [1987] 2 Lloyd's Rep 601 at p.619, "there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later". The parties are largely (in Bingham J.'s phrase in Pagnan at p.611) "masters of their own contractual fate". If parties have shown an intention to be contractually committed, albeit while deferring discussion of some aspect or aspects of the deal, then the court will recognise a contract unless what remains outstanding is not merely important but essential in the sense that without it the contract is too uncertain or incomplete to be enforced.

156. Even if, contrary to my conclusion, the parties were referring on 14 July 2005 to discussions in which they intended to make a contractual arrangement about when there would be settlement, nevertheless I would not have interpreted what they said as indicating an intention to defer making any contract until then. I would have concluded that, Bear Stearns having put forward a firm bid of €2.9 million and that having been accepted, the parties intended to enter into a contract without any express term as to settlement date, pending such further discussions about that. Therefore this is not a case such as May & Butcher where (as Lord Warrington put it at loc cit p.22) to imply a term about when (in the absence of further agreement) there was to be settlement "would not be to imply something about which the parties have been silent" but "to insert in the contract a stipulation contrary to that for which they have bargained". It would be to imply something about which the parties had decided that they should enter into no express contractual commitment for contractual purposes but to remain silent for the time being, expecting to return to it later.

157. I therefore reject that argument that there was no contract because the parties made an agreement to agree.

Forum's argument based on the LMA forms of documentation

158. Before coming directly to Forum's arguments based on uncertainty and want of contractual intention, it is convenient next to refer to an argument based upon the LMA standard documentation that Mr Greenwood advances to support this part of Forum's case.

159. The LMA standard terms provide by clause 2 that a binding contract is made upon oral agreement of "the terms" and, as Forum submit, the expression "the terms" must mean the Agreed Terms, which are defined as "the terms agreed between the Buyer and the Seller in relation to the transaction, as evidenced by the Confirmation". So it is argued that in order for a contract to be concluded, the parties must agree upon the various matters contemplated and referred to in the standard confirmation form, including the settlement date, the form of purchase (whether there is to be transfer or participation or some other arrangement) and other terms of the trade, including representations and warranties. The submission is that, whether or not Mr. Franzese and SP are to be taken to have agreed upon the incorporation of the LMA terms, agreement upon the terms contemplated by the standard LMA form of confirmation should be taken to be fundamental to the completion of a contract. Otherwise, what was agreed would be too uncertain to create a binding contract or alternatively the parties cannot be taken to have intended to conclude one.

160. I cannot accept this argument. First, if I am right to conclude that Mr. Franzese and SP had not agreed to trade upon the basis of LMA terms, Forum's argument could succeed only if they could show a usage or custom of the market. No expert or other evidence that I accept supports this. Indeed the evidence of Mr. Tucker is to the contrary. I have, for example, already referred to his evidence that often agreements are concluded without a settlement date having been agreed, and the LMA documentation provides for a default settlement of 20 business days after the trade date because it contemplates that the parties might not have decided this for themselves.

161. Secondly Forum's argument proves too much. For example, the standard LMA Confirmation form provides for completion of details of the parties' Process Agents. I cannot accept that what would otherwise amount to a contract is to be taken not to be binding because the parties are yet to name Process Agents.

162. Thirdly, as a matter of construing the LMA terms, which are the basis for the argument, I see no reason to interpret "the terms" in clause 2 as referring to Agreed Terms as defined. If the defined expression had been meant, it would have been used.

Was the agreement too uncertain to be contractual?

163. The planks of Forum's argument that the agreement between Mr. Franzese and SP was too vague to be given contractual effect are, as I understand it, that no time for settlement was agreed, that there was no agreement about whether Forum should deliver the benefit of the notes by way of assignment or by way of funded participation or in some other way, and that there was no agreement about what warranties and representations should be given.

164. The fact that the parties did not agree when the transaction should be executed does not mean that the agreement was too uncertain to be enforced as a contract. In the absence of an express agreement, there was an implied term of the agreement that the

parties would execute it within a reasonable time. In the circumstances of this case this amounts to them being under an obligation to execute the transaction promptly once the lawyers had had the time that they required to prepare the necessary documentation.

165. It would seem from Mr. Tucker's evidence to which I have referred that it would be surprising to those operating in the market if the law did not give effect to an agreement because the parties have not specified a time for execution or settlement of a transaction of this kind. He said, and I accept, that there is no expectation or practice that a settlement date has to be agreed.

166. Nor can I accept that a contract of this kind will be void or unenforceable because the parties have not agreed upon the form of purchase. Again there was evidence about what happens in practice: Mr. Pigott explained that (whether or not the transaction is made on LMA terms) in documenting a transaction such as this, the usual course is first to consider whether it can sensibly be executed by transferring the asset; if it can be, to adopt such a structure; and if it cannot, to look to structure the contract on the basis of a participation. I accept this evidence.

167. In this case, as was recognised by all concerned, the true value of the notes lay in the claims in the administration that Forum had made as holder of the notes. That remained the case until the claims were converted into shares in October 2005, and the expectation was that the deal would be settled before the conversion took place. The claims could not be transferred directly to Bear Stearns, and the proposal that Mr. Pigott put forward and that was based upon the LMA form of participation agreement recognised that. Mr. Pigott explained that he regarded himself as simply giving effect to an agreement to which the parties had already committed themselves: I do not regard the exchanges between the lawyers and the questions which they naturally had to resolve as indicating that they had any fundamental difficulty in doing so. It is true that Mr. Lombrassa said in evidence that the administrator would have accepted instructions that the shares should be transferred to Bear Stearns' account, but for my part I cannot see how this would have achieved what Mr. Lombrassa himself said was the purpose of settling the deal, namely to transfer to Bear Stearns the assets that they had bought before the shares in new Parmalat SpA were issued.

168. However, none of these matters, as it seems to me, indicates that the agreement was so vague or uncertain that it is void or unworkable. The essential obligation upon Forum was to ensure that Bear Stearns obtained the commercial benefit of the notes, including, indeed essentially amounting to, the commercial benefit of claims in the administration that had been made or might be made by the holder of the notes. As a matter of legal principle, I would suppose, it was a matter for Forum how they fulfilled that obligation. Certainly Mr. Pigott's proposals and Freshfields' response to them show that it was an obligation that could be fulfilled. In reality, the parties recognised that the machinery by which it would be done would be agreed in discussions between their lawyers.

169. Similarly, I cannot accept that the agreement is too vague or uncertain to be given contractual effect because, apart from the three conditions that Bear Stearns had stipulated (which, for the reasons that I have explained, were terms of the contract), the parties had not stipulated express warranties or representations by the time of the

agreement on 14 July 2005. The law will imply any terms necessary to give business efficacy to what was agreed.

170. I reject the submission that the agreement was too uncertain to be given legal effect.

Intention to create legal relations on 14 July 2005

171. I come to the issue as to whether the parties intended to make a legally binding contract on 14 July 2005. The relevant principles of law are explained in the judgments of Bingham J. and Lloyd L.J. in Pagnan Spa v Feed Producers Ltd, (cit sup) and by Cresswell J. in Manatee Towing Co v Oceanbulk Maritime SA, [1999] 2 AER (Comm) 306 esp at p.325/6. They are not in dispute. The proper approach is, I think, to ask how a reasonable man, versed in the business, would have understood the exchanges between the parties. Nor is there any legal reason that the parties should not conclude a contract while intending later to reduce their contract to writing and expecting that the written document should contain more detailed definition of the parties' commitment than had previously been agreed.

172. In deciding whether the parties evinced the necessary intention to create contractual relations, it is, of course, important to keep in mind the market in which the parties were conducting their negotiations. They were discussing the purchase of private placement notes that were clearly distressed. Whether the instruments be characterised as bonds or as loans or in some other way, the usual (although not invariable) "point of contract" for trading such assets is orally in a telephone conversation. Mr. Villa said that the market "almost always" operated on the basis of oral deals. The expert witnesses were agreed about this, and this was clear from their evidence.

173. There was some difference between Mr. Tucker and Mr. Buckley about the tone of the words commonly used to conclude a deal. According to Mr. Tucker, when they conclude a deal, the parties will normally, but not systematically or necessarily, agree not only upon the price and the asset being traded but upon the trade date, the general nature of the form of purchase and how interest is to be treated. However, the fact that all these matters are not agreed does not mean that no trade has taken place, and in order to avoid a binding contract being made at this point, the parties need to say something explicit to that effect. Mr. Buckley, on the other hand, says that it is normal for very clear words and unambiguous language to be used when a deal is made. Undoubtedly it will always be a matter of interpreting the words used in any particular case, but I prefer the guidance given by Mr. Tucker because I was impressed by the detachment that was apparent throughout his evidence. It is not necessary to use any specific form of words in order to conclude a contract of this kind.

174. Mr. Franzese was experienced in dealing in distressed debt. Mr. Pasquali and Mr. Minerva were both experienced brokers, although I understand that SP more usually traded in the bonds market. Moreover Mr. Franzese had previously made deals with SP. They had done so, as Mr. Minerva readily acknowledged, by reaching oral agreement following oral negotiations in which the parties gradually narrowed the difference between what the buyer would pay and what the seller would accept.

175. It was against this background that the parties had their exchanges on 14 July 2005 in which it was clear that both SP and Mr. Franzese wished to "finalise everything". In these circumstances Mr. Franzese put forward a "firm bid" of €2.9 million. That terminology connoted that, if the bid was accepted, a contract would be concluded. When Mr. Pasquali accepted that bid, in my judgment he evinced an intention to conclude a contract.

176. Mr. Greenwood argued against this conclusion. I should refer specifically to four of his submissions.

177. First, he argued that the parties should not be taken to have intended to conclude an agreement on 14 July 2005 because the agreement was to be referred to the parties' lawyers, and indeed it was Mr. Pasquali's evidence that at the end of his conversation with Mr. Franzese the "discussions would have to be passed to the lawyers for them to reach the agreement and give their approval (opinion)". I cannot accept that this evidence shows that the parties did not intend to conclude a contract. Mr. Tucker's evidence was that if negotiating parties arranged that terms were to be decided by lawyers, that in itself would not be taken to indicate that they did not intend to conclude a contract themselves. I accept that Mr. Tucker's evidence reflects the understanding of the market. Nor can I accept that anything said by Mr. Pasquali went significantly further than that. Mr. Greenwood observes that Mr. Pasquali's evidence about the lawyers giving their approval or opinion was not expressly challenged in cross-examination, but Mr. Franzese denied that this was said and I regard him as the more reliable witness about this conversation. But in any case Mr. Pasquali explained that the reason that the matter was to be passed to the lawyers was because he knew that the mechanics of transferring to Bear Stearns the benefit of the notes would not be as straightforward as with many deals, rather than because the lawyers were needed to endorse what the traders had agreed.

178. Secondly, Mr Greenwood points out that Mr. Franzese acknowledged that when he makes a deal, his practice is to agree a settlement date. However, the involvement of the lawyers and the uncertainty about how long they would take to do their work explain why in this case he did not follow that practice.

179. Next, it is observed that the parties did not simply leave it for the lawyers to decide the settlement date, but they contemplated that they would have to deal with that matter themselves in due course. I cannot attach great significance to this. It is not surprising that when the lawyers had prepared the necessary documentation the parties should decide when they would be able to carry out the formal procedures by way of payment of the price and delivery of the assets. As I have said, Forum would presumably need to make arrangements with Credit Lyonnais to complete the sale of the notes.

180. Mr. Greenwood also relies upon Mr. Franzese's evidence that he expected that Forum would refer to their lawyers Bear Stearns' requirement that the contract include the three conditions. He argues that this, taken together with the fact that there is no evidence that Forum did agree to the three conditions, shows that Forum did not intend to accept the conditions and therefore are to be taken not to have intended to create a binding contract. I am unable to accept this argument either. Whatever Mr. Franzese might have expected about Forum taking legal advice on the conditions, that

is not to say that he was to suppose that, if Forum concluded an agreement without doing so, they would not be intending to be contractually bound. In any case, I have concluded that he made Mr. Minerva aware of the conditions before 14 July 2005, and as far as he was to know, Forum could have consulted lawyers by the time of the telephone conversations on 14 July 2005.

181. I conclude that the parties are to be taken to have intended to conclude a contract on 14 July 2005.

182. Although I do not rely upon this to reach my conclusion that a contract was made, I find support for it in the conduct of the parties and their lawyers after 14 July 2005. By then, Forum (and GDP as their managers) wanted to conclude a deal for the sale of the notes, believing that they would thereby secure an adequate profit on their investment and not wishing to wait to late August 2005 (when it was generally thought and rumoured that the notes would be converted into shares) and to take the risk of a disappointing share price. As Mr. Minerva put it in cross-examination, "We had come to a [price] level that Mr. Villa found interesting and we did not want to miss it".

183. However, after the discussions that day the parties did not press ahead with their negotiations to conclude a contract, as they surely would have done had one not already been made. Nor, in the case of Forum, did they seek to sell the notes to another purchaser, although Mr. Minerva had mentioned this possibility to Mr. Franzese on the telephone on 14 July 2005 and although, according to Mr. Villa, Forum could have obtained a better price than €2.9 million. It seems to me that realistically the position was that a commercial deal had been concluded and the lawyers were implementing it. This is manifest, for example, in Freshfields' replies to the enquiries of KPMG and in the terms of the indemnity that Bear Stearns provided in relation to the late filing claim.

Conclusion on Liability

184. I conclude, despite Mr Greenwood's careful and well-presented arguments, that Forum concluded a contract for the sale of the notes on 14 July 2005. It follows that Bear Stearns do not need to rely upon their alternative arguments that a contract was concluded at a later date or that they can rely upon an estoppel against Forum. I would not have acceded to these arguments, and I should briefly explain my reasons.

Bear Stearns' argument that a contract was concluded or became effective after 14 July 2005.

185. Bear Stearns plead:

i) That if their primary case that a contract was concluded on 14 July 2005 fails because of lack of contractual intention, then Forum subsequently ratified or adopted the agreement.

ii) That if their primary case fails because of uncertainty or because only an agreement to agree was made, then a contract was concluded later as a result of the parties' conduct.

186. In support of their case that Forum adopted or ratified the agreement made on 14 July 2005 so that it became contractually binding upon them, Bear Stearns rely upon Forum going about documenting the sale of the notes, the fact that Freshfields sought in their email of 10 August 2005 Bear Stearns' views about how Forum should vote in the administration and the agreement about pursuing the late filing claim. However, if Forum are to be taken not to have intended to enter into a binding contract on 14 July 2005, that would be because they evinced an intention not to be bound until the lawyers had prepared the documentation or until the parties had agreed about the settlement date or both. In the event, Freshfields' letter of 21 October 2005 was sent before either the documentation was completed or a settlement date was agreed. Moreover it seems to me that Forum's invitation to Bear Stearns to express their views about voting and their willingness to co-operate with regards to the late filing claim are consistent with an expectation that a contract would be concluded no less than with a concluded and binding agreement. After all, Mr. Lombrassa explained that as an Italian lawyer he thought in terms of pre-contractual obligations of good faith.

187. It is true that the wording of Bear Stearns' indemnity about the late filing claim supposed that an agreement for the sale of the notes had been concluded, but I would not have considered this in itself sufficient evidence of Forum's intention to be contractually bound. Further, while the wording of the indemnity was approved by Freshfields, they did not, in my judgment, have authority to enter into a binding contract on Forum's behalf and no more did they have Forum's authority to adopt or ratify an agreement so as to make it binding.

188. In support of their case that the parties' subsequent conduct provided certainty to an agreement made on 14 July 2005 whereby it became an effective contract, Bear Stearns rely upon the fact the parties agreed to go about documenting a sale, and in that process they agreed that the sale should be by way of funded participation and that the contract should be based on LMA terms with minor amendments. They also rely again upon the fact that Freshfields sought Bear Stearns' views about voting in the administration, and upon the indemnity and its terms.

189. It is impossible, in my judgment, to spell out of these exchanges any concluded agreement between the parties that would go to supplement the agreement made on 14 July 2005 so as to provide contractual certainty. The lawyers did not purport to be concluding a binding agreement between their respective clients, and I do not accept that they had authority to do so.

190. For similar reasons these matters would not answer any argument that on 14 July 2005 the parties did no more than reach an agreement to agree.

Estoppel

191. Bear Stearns' argument that Forum are precluded from denying the claim against them because of an estoppel by convention is based on the parties' conduct in relation to the late filing claim. They contend that as a result Forum are estopped from denying that Bear Stearns are entitled to the benefit of the late filing claim and are entitled to the benefit of the notes and claims made under them. The argument is that both parties were acting on the assumption that the parties had concluded a contract

by the time in August 2005 when Bear Stearns provided Forum with the indemnity and the late filing claim was lodged.

192. I consider that this argument fails for reasons essentially similar to those that would defeat Bear Stearns' argument that a contract was concluded after 14 July 2005. In order for there to be an estoppel by convention, it is necessary that the parties act upon an assumed state of facts or law (or a state of facts or law which is assumed by one party and in which the other acquiesces) and that the parties so act that it is unfair to allow one party to deny the assumed facts or law. However, leaving aside the precise wording of the letter of indemnity and its indications that the parties had concluded a contract, the conduct of the parties was equally consistent with a belief (or assumption) that a contract had been concluded and an expectation that a contract would be concluded. I cannot accept that the precise wording of the letter of indemnity in itself establishes that Forum shared an assumption that the agreement was binding, or that it would be unfair for Forum not to be held to the literal meaning of what it said. There is no evidence that it affected anyone's conduct.

193. I add that, if there was no contract and Forum in these circumstances asserted that they were entitled to the benefit of the late filing claim, depending on the precise facts, Bear Stearns might well have had a restitutionary claim in relation to the expenditure that they incurred in pursuing it.

Damages

194. Bear Stearns claim damages to compensate them for the loss that they have suffered as a result of not receiving the 1,692,386 shares in new Parmalat SpA that were issued in the administration. Bear Stearns also plead a claim in respect of a further 646,090 shares that they say will be issued if the late filing claim succeeds. However, for reasons that I shall explain, Bear Stearns do not pursue before me a claim for damages in respect of that.

195. Forum contend that if, as I have concluded, they entered into a contract with Bear Stearns, Bear Stearns have not elected to terminate it, and state that they are prepared to honour their contractual obligations in so far as they relate to the late filing claim. Moreover, even if it be held that Bear Stearns have elected to terminate the contract, they are still prepared to deal with the late filing claim as if the contract were in force and to accept that Bear Stearns should enjoy any benefits that result from it. Bear Stearns for their part contend that they did elect to terminate the contract by Simmons & Simmons' letter of 23 August 2005 or alternatively by sending the proposed amended pleading on 13 September 2005, but, as I have explained, I reject that contention. However that may be, Bear Stearns are content to accept that the position adopted by Forum will satisfactorily meet their complaint in relation to the late filing claim and not to pursue a claim for damages for the potential loss of the 646,090 shares. I see no reason that the court should not give effect to this arrangement, and I will hear submissions about what order I should make to implement it.

196. Section 51 of the Sale of Goods Act 1979 provides that where a seller wrongfully neglects or refuses to deliver goods to the buyer the damages are the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's

breach of contract and that, where there is an available market for the goods in question, the measure of damage is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods when they should have been delivered "or (if no time was fixed) at the time of the refusal to deliver".

197. The notes (and the shares that came to represent the notes) are not "goods" to the sale of which the 1979 Act applies. However it is not disputed that section 51 embodies the principles of law that provide the starting point for assessing damages in this case. As Lord Brown said in Golden Strait Corp v Nippon Yusen Kubishika Kaisha, [2007] UKHL Civ 12 at para 79, "… the rule is by no means confined to the sale of goods context and … has been applied by analogy to a variety of other situations. Essentially, it applies whenever there is an available market for whatever has been lost and its explanation is that the injured party should ordinarily go out into that market to make a substitute contract to mitigate (and generally thereby crystallise) his loss".

198. If damages are to be assessed by reference to the market price of shares in new Paramalat SpA at the time of Forum's refusal to proceed with the contract, I would consider it right to assess them by reference to a price of €2.35 per share, and the damages would, I calculate, have been €1,077,109. On 21 October 2005, the day when Freshfields wrote that Forum would not proceed with the sale, the closing price for the shares was €2.303. On 24 October 2005, the next business day, the shares closed at €2.38, having reached a high of €2.40 during the day. Freshfields sent their letter by email at 10.26 a.m. (Italian time) or 9.26 a.m. (London time) on 21 October 2005. Although the email was sent to Mr. Pigott, who was based in New York, the evidence of Mr. Held was that Bear Stearns learned of Forum's decision promptly when the email was sent. He also believed that, there being a liquid market in the shares, Bear Stearns would have been able to buy 1,692,286 new Parmalat shares within some 24 hours. A detailed calculation of what they would have had to pay is not possible on the evidence before me, and the best that I can do is to take a price about half way between the closing price on 21 October 2005 and a price of €2.40 that the shares reached on 24 October 2005.

199. However, both Bear Stearns and Forum argue that I should not measure damages by reference to the prima facie rule reflected in section 51 of the Sale of Goods Act 1979. Forum say that I should take account of the sale of half the notes by Bear Stearns to Morgan Stanley. Bear Stearns say that their loss should be measured by reference to the share price not in October 2005 but at a later date: either on 7 August 2006 (when the market price would have been €2.602 per share) or on 23 August 2006 (when the market price would have been €2.68 per share) or on 24 August 2006 (when the market price would have been €2.67 per share) or on 13 September 2006 (when the market price would have been €2.795 per share).

The sale to Morgan Stanley

200. Had the contract been fulfilled, Bear Stearns would have sold on to Morgan Stanley half of the interest in the notes that they acquired, and Bear Stearns' profit from their agreement with Morgan Stanley would have been only €112,000. Forum submit that, if the contract with Morgan Stanley is ignored and Bear Stearns' damages are

assessed only by reference to the market price of shares in new Parmalat SpA, then the damages will not put Bear Stearns in the position in which they would have been had the contract been fulfilled, but will overcompensate them.

201. There was an available market in the shares in October 2005. I would, if it be relevant, also infer that there was an available market in the notes at the time of the contract: Mr. Held's evidence was that there was an active market and it was by reference to this that Mr. Marhan advised him about the price that Bear Stearns should pay. I mention this because Bear Stearns bought the notes rather than the shares, and, although they and Forum were aware that the administrators were likely to issue shares to creditors of the Parmalat companies including the holders of instruments such as the notes, they expected that the sale would be completed before then and contemplated that Bear Stearns would acquire the commercial benefit of the notes, not the shares directly. However, as I see it, in as much as the principle behind the prima facie rule reflected in section 51 of the 1979 Act lies in the obligation to mitigate (see Benjamin's Sale of Goods, 7th Ed (2006) at para 17-004), the relevant market is one in the assets which in the event should have been delivered and the question of what was within the parties' reasonable contemplation at the time that the contract was made is beside the point.

202. When they made their contract with Forum on 14 July 2005, Bear Stearns already intended to enter into the agreement with Morgan Stanley, and they concluded that contract on 14 July 2005 shortly after making their contract with Forum. They agreed with Morgan Stanley to sell to them half of their interest in the very notes that they were buying from Forum: the notes were identified specifically in the confirmation documents. However, Forum acknowledge that on 14 July 2005 they knew nothing of Bear Stearns' contract with Morgan Stanley and it was not within their contemplation.

203. Forum argue that the nature of the market was such that it was within the reasonable contemplation of Bear Stearns and Forum when they concluded their contract on 14 July 2005 that in the ordinary course of events Bear Stearns would be likely to sell on all or some of the notes. I accept that submission. However, Forum also argue, as I understand it, that it was within the reasonable contemplation of Bear Stearns and Forum when they made their contract that Bear Stearns would enter into a contract with a third party which committed them to selling on the very notes that they were acquiring from Forum. The basis of this submission is evidence of Mr. Buckley that it would be risky for a trader in the market to "short a loan"; that is to say, it would be risky for a trader to sell a loan until he was entirely sure that he had acquired it and was in a position to complete the sub-sale. I accept that evidence as far as it goes, and I do not doubt that the sale of the notes is comparable for this purpose with the sale of a loan (or a loan of a more usual kind). This conclusion is supported by the evidence of Mr. Held that he had made many "back to back" sub-sales generally comparable with the sale to Morgan Stanley. However, in my judgment, the evidence does not go so far as to show that it is usual for traders to commit themselves to a sub-sale of the very notes that they are buying, or that it was within Forum's reasonable contemplation on 14 July 2005 that in the ordinary course of events Bear Stearns would be likely to enter into such a commitment. I would reject that proposition.

204. Forum rely upon the decision in the Court of Appeal in Bence Graphics Ltd. v Fasson Ltd., [1998] QB 87. In that case the defendants delivered defective vinyl film which was processed to make decals for sea-borne containers. There was an issue whether damages should be measured by reference to the reduction in the value of the vinyl attributable to its defective quality, or whether damages should be measured by reference to the buyers' liability to the subsequent or ultimate users of the product made from the vinyl. The majority of the Court decided that the prima facie measure of damage stated in section 53(3) of the 1979 Act was displaced and the latter approach to assessing damages should be adopted. They so decided despite the precedent of Slater v Hoyle, [1920] 2 KB 11. The two cases, both of which are binding upon me, are not easy to reconcile. However for two reasons I have concluded that the facts of this case are significantly different from those in Bence, and here damages should be assessed by reference to the market value of shares in new Parmalat SpA.

205. First, as Devlin J said in Biggin & Co Ltd v Permalite Ltd, [1951] 1 KB 422 at p.433, the principles in this branch of the law stem "from the broad rule that the damage is to be measured by those consequences of the breach which the parties as reasonable men would, if they had thought about it, have foreseen and accepted as natural and probable". This principle applies either to increase or to reduce damages: "If … a subsale is within the contemplation of the parties, I think that damages must be assessed by reference to it, whether the plaintiff likes it or not", Biggin v Permalite, loc cit, at p.436 (and see Rodocanachi v Milburn, (1886) 18 QBD 67 at p.78, Williams Bros v Ed. T Agius Ltd., [1914] AC 510 at p.522 and Czernikow (C) v Koufos Ltd., [1969] 1 AC 350 at p.416E-F). However it does not suffice to bring a sub-sale within the contemplation of the parties that they were both aware that the buyers were traders who dealt in the assets in question and were likely to sell them. This is stated by Devlin J in Kwei Tek Chao v British Traders and Shippers Ltd., [1954] 2 QB 459 at p.489:

> "It is perfectly true that the defendants knew that the plaintiffs were merchants who had bought for re-sale, but everyone who sells to a merchant knows that he bought for re-sale, and it does not, as I understand it, make any different to the ordinary measure of damage where there is a market. What is contemplated is that the merchant buys for re-sale, but if the goods are not delivered to him he will go out into the market and buy similar goods and honour his contract in that way. If the market has fallen, he has suffered no damage; if the market has risen the measure of damage is the difference in the market price. There are of course cases where that prima facie measure of damage is not applicable because something different is contemplated. If for example a man sells goods of a special manufacture and it is know that they are to be re-sold, it must also be known that they cannot be bought in the market, being specially manufactured by the seller. In such a case the loss of profit becomes the measure of damage. Similarly, it may very well be that in the case of string contracts, if the seller knows that the merchant is not buying merely for re-sale generally but on a string contract where he will re-sell those

> specific goods and where he could only honour his contract by delivering those goods and no others, the measure of loss or profit on the re-sale is the right measure."

206. The question therefore is whether the parties contemplated that Bear Stearns might sell on the notes or part of their interest in them under a contract which they could fulfil only by passing on to their buyer the very assets that they were to acquire under the contract with Forum. That does not mean that the parties must necessarily have contemplated that the contract of re-sale might have stipulated precisely this as a matter of contractual obligation but it must have been within their reasonable contemplation that this was likely to be the effect of a sub-sale. It is not sufficient for Forum to establish that, when Bear Stearns and Forum made their contract on 14 July 2005, it was within their reasonable contemplations that in the ordinary course of events Bear Stearns would re-sell some or all of the notes, and that is all that Forum have established.

207. This is, I think, in accordance with the judgments in Bence. They emphasise the importance of whether the parties to the contract are to be taken to have known (or to have had within their contemplation) sufficient details of the arrangements for sub-sale that the buyer had made. This is the basis on which Otton L.J. (loc cit at p.99C) distinguished the facts of that case from those in Slater v Hoyle, and see the judgment of Auld L.J. at p.106E.

208. Secondly, Bence and Slater v Hoyle are both cases in which goods of defective quality were delivered. This case is concerned with a failure or refusal to deliver. In Slater v Hoyle the Court of Appeal decided that the impact on the buyers' loss of a sub-sale should be left out of account in assessing damages because, where defective goods were delivered, the court should adopt the same approach to assessing damages as for cases where there had been a failure or refusal to deliver; and it had been decided by the Court of Appeal in Rodocanachi v Millburn, (1886) 18 QBD 67 and by the House of Lords in Williams Bros. v Ed. T Agius Ltd., [1914] AC 510 that in cases of non-delivery the impact of sub-sales should be ignored. Even if, in cases where it was in the reasonable contemplation of the parties that the buyer would re-sell the goods, the criticisms of Slater v Hoyle made in Bence might justify a relaxation of the restrictions upon when damages for the delivery of defective goods are to be assessed by reference to the loss on a re-sale and not on the basis of market prices, I do not consider that Bence can be interpreted as similarly restricting the ambit of the prima facie rule in cases of non-delivery.

209. I therefore conclude that there is no proper basis in this case for displacing the prima facie rule that damages are to be assessed by reference to the market values of the shares that were issued in respect of the claims in the administration, and the impact of the sale to Morgan Stanley is to be disregarded.

The date of valuation

210. I come to the question whether the damages are to be assessed by reference to the October 2005 market value of the shares of €2.35 or by reference to their market value at some later date. Forum contend that the value in October 2005 should be

used, arguing that this is an application of the ordinary rule, sometimes called the "breach date rule", that damages for breach of contract are to be assessed at the date of the breach.

211. However, it is not an invariable rule that damages are assessed at the date of breach. In Johnson v Agnew, [1980] AC 367 at p.400H, Lord Wilberforce stated the position thus:

> "The general principle for the assessment of damages is compensatory, i.e., that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach – a principle recognised and embodied in section 51 of the Sale of Goods Act 1893. But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances.
>
> In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost. Support for this approach is to be found in the cases. In Ogle v Earl Vane, (1867) L.R. 2 Q.B.275; L.R. 3 Q.B. 272 the date was fixed by reference to the time when the innocent party, acting reasonably, went into the market; in Hickman v Haynes, (1875) L.R. 10 C.P. 598 at a reasonable time after the last request of the defendants (buyers) to withhold delivery. In Radford v De Froberville,[1977] 1 W.L.R. 1262, where the defendant had covenanted to build a wall, damages were held measurable as at the date of the hearing rather than at the date of the defendant's breach, unless the plaintiff ought reasonably to have mitigated the breach at an earlier date."

212. Bear Stearns argue that damages should not be assessed by reference to the value of the shares in October 2005 because then they, as the innocent party, were behaving reasonably in seeking to have the contract completed, and it is logical and just that the measure of damage should reflect this. Bear Stearns considered that Freshfields' letter of 21 October 2005 provided no reason that withstood scrutiny for Forum withdrawing from the sale. Thereafter in the proceedings that they issued on 23 December 2005 Bear Stearns sought specific performance.

213. Forum argue that Bear Stearns did not behave reasonably in response to Freshfields' letter of 21 October 2005 because this was a case in which specific performance was never an appropriate remedy. They say that the claim was for the non-delivery of shares which were available on the market, and (citing the Golden Strait Corp case, cit sup, at para 80 per Lord Brown) that the appropriate remedy is damages by reference

to the time at which Bear Stearns might have acquired replacement shares in that market. However, this argument acknowledges only Bear Stearns' claim for the loss of the 1,692,386 shares issued in the administration in October 2005. It disregards the late filing claim, and Bear Stearns always saw the chance of pursuing the late filing claim as one of the commercial attractions of the purchase. If Bear Stearns had elected to terminate the contract, they would have had no right to require that the late filing claim be pursued in Forum's name and they would have had only a claim for damages in respect of it. The calculation of those damages would, to say the least, have been complex and uncertain. (As I have explained, in the event, Bear Stearns do not seek damages under that head, but there is no reason to think that, if Bear Stearns had elected to terminate the contract in October 2005, they could then have safeguarded the late filing claim by such an agreement with Forum, and no suggestion that Bear Stearns should have appreciated this possibility.)

214. However, the fundamental question underlying Forum's argument, as I see it, is not whether specific performance was a remedy available to Bear Stearns but whether Bear Stearn's conduct was reasonable. In Radford v de Froberville, [1977] 1WLR 1262 at p.1285G Oliver J formulated this question about the date for measuring damages:

> "… at what date could the plaintiff reasonably have been expected to mitigate the damages by seeking an alternative to the performance of the contractual obligation? In contracts for the sale of goods, for instance, where there is an available market the date of non-delivery is generally the appropriate date because it is open to the plaintiff by going into the market immediately. "

It is because of the claimant's duty to mitigate his damage, I think, that in Johnson v Agnew (loc cit) Lord Wilberforce emphasised that the vendors acted reasonably in not bringing an earlier claim for damages.

215. I do not consider that Bear Stearns were unreasonable to prefer to preserve their contractual rights in relation to the late filing claim and to pursue a claim in specific performance rather than content themselves with damages, not least because of the difficulty in assessing damages for the late filing claim. Nor does it seem to me that Bear Stearns, having made a decision to seek specific performance which, as I conclude, was reasonable and justified by their assessment of the potential value of the late filing claim, can be said to have behaved unreasonably in not going into the market to buy shares to replace the 1,692,386 shares while there was a continuing dispute about whether Forum were obliged to fulfil the contract. After all, as far as Bear Stearns knew, Forum still had the shares and might have tendered them, and Bear Stearns might then have found that they had invested more heavily in new Parmalat SpA than they would have wished. As long as they did not elect to terminate the contract, Bear Stearns took the risk of a fall in the market price of shares that Forum might have tendered at any time. I do not overlook Mr Held's evidence that Bear Stearns' strategy was to build up a holding in new Parmalat SpA, but that does not mean that they should have faced this uncertainty about the extent of their exposure. It was Forum's wrongful act that presented Bear Stearns with the decision how to protect their position, and the court will not be quick to criticise the response

of the innocent party faced with a decision arising from the other party's wrongful act: see Habton Farms v Nimmo, [2004] QB 1 at p.34B per Auld L.J.

216. I therefore do not consider the Bear Stearns were unreasonable in not availing themselves of the available market and in relying upon their rights against Forum, and do not consider it logical or just to limit their damages to a measure based on the value of shares in Parmalat SpA in that market in October 2005.

217. I have considered another possible objection to Bear Stearns's argument that their damages should be assessed by reference to the market price in August 2006. Is it open to them to say that it was reasonable for them not to go into the market to buy replacement shares in October 2005 and that therefore damages should be assessed by reference to the value of shares at a later date, and at the same time to contend that the sub-sale to Morgan Stanley should be ignored? After all, a rationale for the rule enunciated in Slater v Hoyle (cit sup) is, as Scrutton LJ said at p20:

> "If the plaintiff has a profitable contract to sell goods, and there is a market, he can supply himself with goods by purchasing in the market; and he is then left without the goods he should have received under the original contract and has lost their market value. But suppose his sub-contract is at a price below instead of above the market price, so that, if he delivers goods under the sub-contract he loses. Can his damages be limited by the amount he would have received on the sub-contract? On the above reasoning it would seem not. He could supply the sub-contract by buying in the market, and then he should have goods delivered to him of a certain market value, which he has lost because they were not delivered."

218. Can Bear Stearns rely upon the availability of a market to evoke the prima facie rule that damages are measured by the market price, ignoring the sub-sale to Morgan Stanley, and at the same time say that they were reasonable not to avail themselves of that market? After all, the reasonableness of their conduct is to be determined, as a question of mitigation, by reference to the position in which they found themselves when Forum breached the contract in October 2005 and not only by reference to what the parties reasonably contemplated when they made their contract.

219. There is to my mind no inconsistency in Bear Stearns' position. If their only claim had been in respect of the 1,692,386 shares, then damages would be assessed on the basis that they could and should have bought shares in the market, and thereby they could and should have honoured any sub-sale if and in so far as they were obliged to Morgan Stanley to deliver shares in new Parmalat SpA. That is the relevance of the available market that justifies ignoring the sub-sale to Morgan Stanley when assessing Bear Stearns' damages, and the late filing claim does not impinge upon that justification. However the considerations which justify measuring loss by reference to a market date later than October 2005 are broader, and here the late filing claim is relevant. Because of it Bear Stearns were reasonable in not going into the market to

buy shares to replace what they should have received from Forum. That was the only way in which they could both preserve the late filing claim by not accepting Forum's wrongful conduct so as to terminate the contract and also avoid excessive exposure to any fall in the value of shares in new Parmalat SpA.

220. I have thus far proceeded on the assumption that Forum were in breach of the contract when Freshfields sent their letter of 21 October 2005. Indeed, Bear Stearns plead that Forum were in breach of contract when by that letter they stated their refusal to comply with their obligation to sell the notes. In itself, however, Freshfields' letter was no more than a repudiation or anticipatory breach of the contract and was of no effect unless and until Bear Stearns' elected to terminate the contract. The application of the date breach rule where there is an anticipatory breach of contract is that the date of breach is taken to be when the innocent party accepts the breach so as to terminate the contract: see Golden Strait Corp v Nippon Yusen Kubishika Kaisha, (loc cit) at paras 17 and 57. This is because, as is stated in Chitty on Contracts 29th Ed. (2004) Vol. 1 at para. 26-106, "The rules of mitigation do not apply to the innocent party's choice between different remedies open to him following the other party's breach of contract: he is not bound to act "reasonably" in exercising his choice". In Johnson v Agnew (cit sup) Lord Wilberforce examined the reasonableness of the vendor's response to an actual breach of contract. (Section 51(3) of the Sale of Goods Act 1979 refers to measuring damages by reference to the time of refusal to deliver where no time for delivery is fixed, but, as is explained on Benjamin's Sale of Goods 7th Ed. (2006) at paras 16-072, 16-082 and 17-013, whatever the effect of that provision, it does not apply where there was been an anticipatory breach of contract that has not been accepted. (The question when a refusal to deliver is relevant under the section is, in any case not without difficulty: see Benjamin's Sale of Goods (cit. sup.) at para 17-010.)

221. However, in view of Bear Stearns' pleading and the conclusion that I reach about the proper measure of damages on the assumption that Forum were in breach of contract of 21 October 2005, I need say no more about this. I can well see that Forum's failure to provide reasonable co-operation to have the lawyers complete the necessary documentation might give rise to a contractual breach, and Forum did withdraw Freshfields' instructions. The distinction between an anticipatory repudiation and a repudiatory breach (or, as it might be put, between a repudiation manifested in conduct involving a contractual breach and a repudiation otherwise evinced) is not always clear-cut.

222. I conclude that for these reasons Bear Stearns behaved reasonably in and after October 2005, and that Bear Stearns are entitled to have their damages measured by reference to the value of the shares at a later date. Although, I am told, the share price in new Parmalat SpA has continued to rise, Bear Stearns do not contend that their loss should be measured by reference to a price later than 13 September 2006. Nor have they argued that, once they knew that Forum had disposed of the shares, they could not reasonably have bought replacement shares in the market. They then knew, as Lord Wilberforce put it in Johnson v Agnew, "the contract [was] lost", and there was no realistic risk that Forum would tender delivery under it. It was not put to Bear Stearns' witnesses and is not suggested that in August 2006, having learned of the share sales by Forum, Bear Stearns acted unreasonably in seeking confirmation of the position by Simmons & Simmons' letter of 23 August 2006. It seems to me that

it is just to measure their loss by reference to the value of the shares on 24 August 2006 when Masseys LLP replied to it. As I have said, I take that price to be €2.67 (the day's share price ranging, I am told, between a high of €2.68 and a low of €2.66).

Conclusion on Quantum

223. I therefore conclude that Bear Stearns' damages are to be assessed by reference to a market value of €2.67 per share. I calculate damages on this basis to be €1,618,670. I invite Bear Stearns to calculate a claim for interest on this amount from 24 August 2006.