Neutral Citation Number: [2022] EWHC 754 (Comm)

Case No: CL-2019-000527

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/04/2022

Before :

MISS JULIA DIAS QC SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

PRAKASH INDUSTRIES LIMITED	**Claimant**
- and -	
PETER BECK UND PARTNER VERMÖGENSVERWALTUNG GmbH	**Defendant**

- -
- -

Mr Charles Kimmins QC and Miss Susannah Jones (instructed by **Hill Dickinson LLP**) for the **Claimant**
Mr Andrew Spink QC and Mr Saaman Pourghadiri (instructed by **Signature Litigation LLP**) for the **Defendant**

Hearing dates: 7-10, 15 February 2022

- -

Approved Judgment

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

.....

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10:00 am on 1 April 2022. A copy of the judgment in final form as handed down can be made available after that time, on request by email to the judge's Clerk.

Miss Julia Dias QC:

Introduction

1. This is a dispute concerning unsecured Foreign Currency Convertible Bonds (the "Bonds"). The Bonds in question were issued on 8 January 2018 by the Claimant, Prakash Industries Ltd ("Prakash"), a listed Indian integrated steel and power company. The bondholder and Defendant in the action is a German investment vehicle, Peter Beck und Partner Vermögensverwaltung GmbH ("PBP"). The shares in PBP are all held by a German national, Mr Bernd Högel (referred to in the documents as "Bernie"), and his immediate family. Bernie lives in Namibia. The sole director of PBP is Bernie's younger brother, Mr Frank Högel ("Frank"). However, it is common ground that Frank played no part in the day-to-day management of PBP's investments, which were all handled and managed by Bernie.

2. Although nominally the Claimant in these proceedings, Prakash's claim is simply for negative declaratory relief.[1] The nub of the dispute concerns counterclaims by PBP as follows:

    i) A claim in debt for payment of an Early Redemption Amount (the "ERA") which PBP alleges fell due upon its valid exercise of a contractual right to accelerate repayment of the Bonds following an Event or Events of Default by Prakash in failing to pay coupon interest on the Bonds. For its part, Prakash admits that coupon interest was not paid but denies any Event of Default. It claims that the obligation to make payment never arose because PBP had failed to provide details of a contractually compliant bank account into which payment could be made and that in the circumstances of the case there was no contractual obligation to pay in any other way. Alternatively, it alleges that even if there had been one or more Events of Default, PBP had waived its right to serve a Notice of Default in respect thereof.

    ii) A claim for damages for breach of contract in having failed to issue shares within the contractually stipulated timeframe following service by PBP of three separate notices to convert various tranches of Bonds into shares. Again, Prakash admits the delay but asserts that any loss was suffered by Bernie rather than PBP and, further, that the claim has been artificially inflated by applying the wrong measure of loss and is in any event unsustainable on the facts.

[1] An alternative, subsidiary claim in damages was pleaded but this was not relied upon to any significant extent at the hearing and, in any event, was parasitic upon the main issues in the action.

The relevant contractual provisions

3. As between the parties, the relevant contractual provisions were contained in a Subscription Agreement dated 20 December 2017 and the Offering Circular for the Bonds dated 8 January 2018. Schedule 1 to the Subscription Agreement set out the Terms and Conditions governing the Bonds which were to be contained in the Offering Circular. For the most part, the text of Schedule 1 and the equivalent text in the Offering Circular were identical, although there were some differences. In the event, none of these differences bore on the matters that I have to decide.

4. The key provisions of the Subscription Agreement relied upon were as follows:

> *"**RECITALS***
>
> *...*
>
> *(F) The Bonds will be issued in registered form in denominations of US$100,000 (One hundred thousand US Dollars), details of which will be contained in the Offering Circular;*
>
> *...*
>
> *(I) Each Bond will be convertible at the option of the Subscriber into Shares on or after the Issue Date until and including the Maturity Date at a conversion price of Rs.100 per Share (the "Initial Conversion Price"), subject to adjustment as provided in this Agreement (the Shares issued on conversion of the Bonds being referred to as the "Conversion Shares");*
>
> *(J) The Issuer has applied for "in principle" approval from the BSE and the NSE to list the Shares to be issued on conversion of the Bonds. Upon conversion of the Bonds, the Company will make a formal application to the BSE and the NSE for approval to list and trade the Shares to be issued on conversion of the Bonds in accordance with the conversion procedure described in the Offering Circular;*
>
> …
>
> ***OPERATIVE PROVISIONS***
>
> ***1. INTERPRETATION***
>
> *1.1 ...*
>
> ***"Terms and Conditions of the Bonds"** means the Terms and Conditions of the Bonds set out in Schedule 1 hereto;*
>
> *...*
>
> ***2. ISSUE OF THE BONDS***
>
> *...*

2.2 Title to the Bonds passes only by transfer and registration in the Register. The holder of any Bond will (except as otherwise required by law) be treated as its absolute owner for all purposes (whether or not it is overdue and regardless of any notice of ownership, trust or any interest in it or any writing on, or the theft or loss of, the Certificate issued in respect of it) and no person will be liable for so treating the holder. In these Conditions "Bondholder" and (in relation to a Bond) "holder" means the person in whose name a Bond is registered.

...

2.5 The Issuer irrevocably undertakes to the Subscriber (subject to the terms and in accordance with the provisions of this agreement including the Terms and Conditions of the Bonds as per Schedule 1) to issue the Bonds to the Subscriber. The Bonds will be governed by the Offering Circular and be evidenced by issue of Bond Certificates (the "Certificates") in integral multiples of US$100,000.

The Issuer will within 30 days from the date of this Agreement

...

(3) execute and deliver final Offering Circular conforming to Terms & Conditions of the Bonds as per Schedule 1 of this agreement, to the Registrar & Transfer Agent including each Subscriber;

...

4. OFFERING CIRCULAR

The Offering Circular contains all information with respect to the Issuer and the Terms & Conditions of the Bonds which is material in the context of the Offering;

...

SCHEDULE 1

TERMS AND CONDITIONS OF THE BONDS

The following terms and conditions shall govern the issue, subscription, conversion and transfer of the Bonds. The following terms and conditions (other than the words in italics) is the text of the Terms and Conditions of the Bonds which will appear on the reverse of each of the definitive certificates evidencing the Bonds.

...

The Issuer may enter into a paying, conversion and transfer agency agreement (as amended or supplemented from time to time, the "Agency Agreement") dated [•] with [•] as principal paying, conversion and transfer agent (the "Principal Agent"), [•] as registrar (the "Registrar") and the other paying, conversion and transfer agents appointed under it (each a "Paying Agent", "Conversion Agent", "Transfer Agent" (references to which shall include the Registrar) and together with the Registrar and the Principal Agent, the "Agents" relating to the Bonds... The Bondholders are entitled

to the benefit of, are bound by, and are deemed to have notice of, all the provisions applicable to them which are contained in the Agency Agreement.

…

5. INTEREST

5.1 ***Interest Rates***

5.1.1 Subject to the Conditions, the Bonds will, other than as set out in Condition 5.2.2, bear interest from Issue Date at the rate of 5.95 per cent, per annum. Such interest will be payable in cash semi-annually in arrears on April 1 and September 30 in each year (each an "Interest Payment Date") with (a) the first such payment being made on April 1, 2018 in respect of the period from and including the Issue Date and excluding the first Interest Payment Date (b) the last such payment on December 31, 2022 in respect of the period from and including September 30, 2022 to and including January 15, 2023 (the "Maturity Date").

…

6. CONVERSION

6.1 ***Conversion Right***

6.1.1 Conversion Period:

(i) Subject as hereinafter provided, Bondholders have the right to convert their Bonds into registered Equity Shares of Rs.10 each in the capital of the Issuer credited as fully paid up (the "Equity Shares") at any time during the Conversion Period referred to below. The right of a Bondholder to convert any Bond into Shares is called the "Conversion Right"

Subject to and upon compliance with the provisions of this Condition, the Conversion Right attached to any Bond may be exercised, at the option of the holder thereof, at any time (subject to Condition. 6.1.1(ii) on and after January 15, 2018 (the Issue Date) up to the close of business (at the place where the Certificate evidencing such Bond is deposited for conversion) on December 31, 2022 ...

…

6.2 ***Conversion Procedure***

6.2.1 Conversion Notice:

(i) To exercise the Conversion Right attaching to any Bond, the holder thereof must complete, execute and deposit at his own expense during normal business hours at the specified office of any Conversion Agent a notice of conversion (a "Conversion Notice") in duplicate in the form (for the time being current) obtainable from the specified office of each Agent, together with (a) the relevant Certificate; (b) certification by the Bondholder, in the form obtainable from any Conversion Agent, as may be required under the laws of the Republic of India or the jurisdiction in which the specified office of such Conversion Agent shall be located; and (c) any amounts required to be paid by

the Bondholder under Condition 6.2.2. A Conversion Notice deposited outside the normal business hours (being between 9:00 a.m. and 3:00 p.m. (London time/Germany time) Monday to Friday (other than public holidays)) or on a day which is not a business day at the place of the specified office of the relevant Conversion Agent, shall for all purposes, be deemed to have been deposited with that Conversion Agent during the normal business hours on the next business day following such business day. Any Bondholder who deposits a Conversion Notice during a Closed Period will not be permitted to convert the Bonds into Shares (as specified in the Conversion Notice) until the next business day after the end of that Closed Period, which (if all other conditions to conversion have been fulfilled) will be the Conversion Date for such Bonds, notwithstanding that such date may fall outside of the Conversion Period. A Bondholder exercising its Conversion Right for Shares will be required to open a depository account with a depositary participant under the Depositories Act (Act 22), 1996 of India (the "1996 Depositories Act"), for the purposes of receiving the Shares.

...

(iii) The conversion date in respect of a Bond (the "Conversion Date") must fall at a time when the Conversion Right attaching to that Bond is expressed in these Conditions to be exercisable (subject to the provisions of Condition 6.1.4 and Condition 10) and to the provisions of Condition 6.2.1(i) will be deemed to be the date of surrender of the Certificate in respect of such Bond and delivery of such Conversion Notice and, if applicable, any payment to be made or indemnity given under these Conditions in connection with the exercise of such Conversion Right. A Conversion Notice once delivered shall be irrevocable and may not be withdrawn unless the Issuer consents to such withdrawal.

…

6.2.3 Delivery of Shares

(i) Upon exercise by a Bondholder of its Conversion Right for Shares, the Issuer will, on or with effect from the relevant Conversion Date, enter the name of the relevant Bondholder or his/their nominee in the register of members of the Issuer in respect of such number of Shares to be issued upon conversion ... and will, as soon as practicable, and in any event not later than fourteen (14) days after the Conversion Date, cause the relevant securities account of the Bondholder exercising his Conversion Right or of his/their nominee, to be credited with such number of Shares to be issued upon conversion ... and shall further cause the name of the concerned Bondholder or its nominee to be registered accordingly, in the record of the beneficial holders of shares, maintained by the depository registered under the 1996 Depositories Act with whom the Issuer has entered into a depository agreement ...

…

6.4 ***Undertakings***

6.4.1 The Issuer has undertaken that so long as any Bond remains outstanding ... it will:

…

(iv) credit equity shares of the Issuer to the account nominated by the Bondholder within fourteen (14) business days from the date of receipt of the original conversion notice.

…

7. PAYMENTS

7.1 ***Principal and Premium***

Payment of principal, interest, all accrued interest (if any) and default interest (if any) will be made by transfer to the registered account of the Bondholder or by U.S. dollar cheque drawn on a bank in New York mailed to the registered address of the Bondholder if it does not have a registered account, in each case, in accordance with provisions of the Agency Agreement…

7.2 ***Interest***

Interest due on any Interest Payment Date will be paid to the holder shown on the Register at the close of business on the fifteenth calendar day prior to the Interest Payment Date (the "Record Date"). Such payment will be made by transfer to the registered account of the Bondholder or by US dollar cheque drawn on a bank in New York City mailed to the registered address of the Bondholder.

For these purposes, a Bondholder's "registered account" means the U.S. dollar account maintained by or on behalf of it with a bank in New York, details of which appear on the Register at the close of business on the second business day before the due date for payment but for interest due on an Interest Payment Date it is on the Record Date, and a Bondholder's "registered address" means its address appearing on the Register at that time.

…

7.6 ***Default Interest and Delay In Payment***

7.6.1 If the Issuer fails to pay any sum in respect of the Bonds when the same becomes due and payable under these Conditions, interest (including interest of 5.95 per cent and additional default interest of 2 per cent) shall accrue on the overdue sum. The additional default interest of 2 per cent per annum shall accrue on the overdue sum until receipt of all sums due in respect of the Bonds. Such interest and default interest shall accrue on the basis of the actual number of days elapsed and a 360-day year.

…

10. EVENTS OF DEFAULT

10.1 The holders of not less than 25 per cent. in Principal Amount of the Bonds then outstanding may give notice to the Issuer that the Bonds are, and they shall accordingly thereby become, immediately due and repayable at their Early Redemption Amount (subject as provided below and without prejudice to the right of Bondholders to exercise the Conversion Right in respect of their Bonds in accordance with Condition 6) if any of the following events (each an "Event of Default") has occurred and is continuing:

10.1.1 a default is made for a period of fifteen (15) Business Days or more in the payment of any amounts due in respect of the Bonds, whether in respect of principal, premium or interest;

10.1.2 failure by the Issuer to deliver the Shares as and when such Shares are required to be delivered following conversion of a Bond;

10.1.3 the Issuer does not perform or comply with one or more of its other obligations covenants, conditions or provisions under the Bonds, or these Conditions, including without limitation, failure to comply fully with Condition 6.4.1, which default is incapable of remedy or, if in the opinion of the Bondholders capable of remedy, is not in the opinion of the Bondholders remedied within fifteen (15) Business Days after written notice of such default shall have been given to the Issuer by the Bondholders.

…

11. ACCELERATION OF MATURITY

11.1 If an Event of Default (other than an Event of Default specified in Condition 10.1.6 or 10.1.7 occurs and is continuing, then and in every such case the bondholders may declare the Early Redemption Amount of the Bonds to be due and payable immediately, by a notice in writing to the Issuer, and upon any such declaration such Early Redemption Amount shall become immediately due and payable, subject to compliance with all applicable laws.

…

12. ENFORCEMENT BY THE BONDHOLDERS

12.1 The Issuer covenants that if an Event of Default as mentioned above in Condition 10 occurs and is continuing, then the Issuer will, upon demand of the Bondholders, pay to the holders of the Bonds, the Early Redemption Amount, and default interest on the Early Redemption Amount and, in addition thereto, such further amount as shall be sufficient to cover the reasonable costs and expenses of collection, including the reasonable expenses, disbursements and advances of the Bondholders, their counsel, and the reasonable compensation of such counsel, subject to compliance with all applicable laws.

…

12.6 No delay or omission of the Bondholders or Holder of any Bond to exercise any right or remedy accruing upon any Event of Default shall impair any such right or remedy or constitute a waiver of any such Event of Default or an acquiescence therein. Every right and remedy given by these Conditions or by law to the Bondholders may be exercised from time to time, and as often as may be deemed expedient, by the Bondholders.

12.7 The Bondholders may waive any past default hereunder and its consequences, except a default in respect of the payment of the Early Redemption Amount or interest with respect to any Bond. Upon any such waiver, such default shall cease to exist, and any Event of Default arising therefrom shall be deemed to have been cured, for every

purpose of these Conditions; but no such waiver shall extend to any subsequent or other default or Event of Default or impair any right consequent thereon."

5. The Offering Circular provided that it contained *"the complete agreement relating to the Bonds and supersedes all prior commitments, agreements and understandings, whether written or oral."* It also supplied the details of the Agency Agreement which had been left blank in the preamble to Schedule 1, specifying that it was an agreement dated 8 January 2018 entered into with Elara Capital PLC, London ("Elara") as registrar, transfer and conversion agent.

6. The Claimant further relied on this Agency Agreement which contained the following provisions (adopting the same definitions as in the Bonds themselves):

*"**WHEREAS***

…

(B) The Registrar and Transfer Agent is being appointed by the Company for the purpose of maintaining record of the Bondholders, to facilitate transfer of the Bonds and the conversion of Bonds into equity Only.

…

4. PAYMENT BY THE COMPANY

All payment of Interest and Principal when due as per the Terms & Conditions of the Bonds will be made by the Company directly to the registered Bondholders on each of the payment dates. The list of registered Bondholders together with their Bank details will be made available by the Registrar on request of Company. The Company shall make payments in the name of the registered Bondholder only.

5. CONVERSION

5.1 ***Conversion Duties of Agents:***

(a) During the Conversion Period, each Conversion Agent shall accept deposit at its specified office on behalf of the Company (between 9:00 a.m. and 3:00 p.m. on any Business Day in the place of such specified office) of:

> *(i) any definitive Certificates (if issued) in respect of Bonds which the holder thereof desires to convert (and in respect of which a Conversion Notice is deposited with that Conversion Agent prior to the Conversion Date) together with a Conversion Notice duly completed and signed (where necessary); or*

together with, in each case, certification by the Bondholder in accordance with Condition 6.2.1…

…

> *5.2* ***Certificates held by Conversion Agents:*** *On deposit of a Certificate and a Conversion Notice … in accordance with Clause 5.1, the Certificate and the Conversion Notice so deposited shall be deemed to be held by the Conversion Agent as the agent of the Company…*
>
> *…*
>
> *5.3* ***Notification by Conversion Agents:***
>
> *(a) Following deposit of a Certificate (if applicable) and Conversion Notice (in duplicate and/or in original or, as the case may be, faxed form) in accordance with Clause 5.1, the Conversion Agent with which they were deposited shall (A) verify that the Conversion Notice (in duplicate and/or in original or, as the case may be, faxed form) has been given in accordance with Condition 6.2.1 and duly completed in accordance with its terms and that the Conversion Notice is accompanied by: (i) all Certificates (if applicable) to which it relates, (ii) a certificate evidencing payment by the Bondholder under Condition 6.2.1(i) … and (B) endorse the Conversion Notice to that effect. Each Conversion Agent will send by post (at the Company's risk and expense) to the Company the original Conversion Notice if this has been received by the Conversion Agent or the Conversion Notice in facsimile form that has been received pursuant as soon as reasonable following any such request by the Company.*
>
> *…*
>
> *5.4* ***Delivery by the Company:*** *Upon receipt of the relevant Conversion Agent Conversion Notification, the Company shall, subject to any applicable limitations then imposed by laws and regulations in effect in India:*
>
> *(a) as soon as practicable and in any event not later than 14 working days after the Conversion Date, to cause the relevant securities account of the Bondholder to be credited with the relevant number of Shares and to cause the name of the Bondholder or its nominee to be registered accordingly, all as provided in Condition 6.2.1…*

The background facts

7. The relevant background facts were not substantially in dispute and can be relatively shortly stated.

8. Bernie has been interested in finance and investments for most of his life. After an initial career in banking as a securities advisor, he started his own asset management company under the name of Peter Beck & Partner, typically managing investments of around €20,000-€150,000 for smaller clients, as well as his own money. The present Defendant, PBP, is only one of a wider group of companies owned and/or controlled by Bernie, at least one other of which also bears the Peter Beck name (Peter Beck und Partner Vermögensverwaltung Ltd). PBP ceased investing third party assets some years ago and now invests solely on its own account. It is run as a family business and is wholly owned and funded by Bernie and his immediate family.

9. As already noted, the sole director of PBP is Mr Frank Högel but since Frank did not have the same investment experience as Bernie, it was agreed and understood between them that Bernie would handle all matters related to investment and would make all the

day-to-day trading and investment decisions. It was apparent that Frank gave Bernie an almost totally free hand in this respect and that the two only spoke infrequently every 4-6 weeks or if there was something specific to discuss. Nonetheless, Frank disclaimed the suggestion that he was a mere postbox.

10. Following the Panama Papers scandal, the bank accounts of the various corporate entities in the group (all of which appear to have been held offshore) were all closed down. This had the unfortunate consequence for Bernie that none of the companies, including PBP, any longer had the means of making or receiving payment from or into a bank account. Any payments to or from the companies therefore had somehow to be routed through Bernie's own personal account no. 3223901 with Banque de Luxembourg ("BDL"), of which he accepted that he was and always had been the sole account holder.

11. Executing payment to PBP or other group companies by means of direct payment into Bernie's personal account proved to be anything but straightforward because of the inevitable mismatch between the name of the payee (PBP, for example) and the name of the account holder (Bernie). Indeed, Bernie accepted that the closure of the companies' offshore accounts caused him serious difficulties in this regard as he set out in an email of complaint to BDL dated 7 November 2017. As appears below, he adopted various stratagems to overcome the problem and was at least partially successful to the extent that BDL agreed to accept payments into the account in favour of group companies provided that Bernie's name was also mentioned in the payment instructions. Nonetheless, the documents before the court indicate that other institutions were not so amenable and refused to make payments into any account which did not exactly mirror the name of the payee.

12. Prakash is a small to mid-size integrated steel and power company incorporated in India in 1980. It issued convertible bonds for the first time on 14 October 2009, with Elara as lead manager. PBP subscribed to these bonds using funds provided by Bernie. The position in the bonds was sold at a profit. The entire proceeds were rolled into new bonds issued by Prakash in 2010 and maturing in 2015. These were variously referred to as the "2010 Bonds" and the "2015 Bonds". To avoid confusion, I shall refer to them as the "2010/2015 Bonds". Bernie's evidence was that the majority of PBP's 2010/2015 Bonds were purchased through a Hong Kong broker, Goldin Equities, although some may also have been purchased through another intermediary.

13. Towards the end of 2014, Prakash anticipated difficulties in redeeming the 2010/2015 Bonds on maturity and embarked on restructuring negotiations. Most of the existing bondholders agreed to restructure but some, including PBP, were unwilling to accept the terms offered. Negotiations therefore continued in respect of the remaining 2010/2015 Bonds, the majority of which were held by PBP.

14. Eventually agreement was reached between Prakash and PBP on terms (recorded in the Subscription Agreement) that the entirety of PBP's holding should be rolled into a new issue of 5.95% foreign currency convertible bonds maturing in 2023 with a conversion price of INR 100. These are the Bonds at the heart of the current dispute. The Bonds were issued on 8 January 2018 on similar but not wholly identical terms to those of the previous issues. Unlike previous issues, they were held in paper form by Elara, which also maintained the bondholder register. The total issue was US$24.3m, of which PBP was the registered holder of US$21.6m.

15. As appears from the terms and conditions of the Bonds set out above, coupon interest was payable on 1 April and 30 September each year unless the shares had been trading at more than INR135 for thirty consecutive trading days prior to the payment date.

16. In January and February 2018, Prakash's share price was at its highest level for nearly 10 years, having reached a high of over INR 250, and Bernie was anxious to convert a first tranche of the Bonds. To that end (and unbeknownst to Prakash), a Bond Conversion Agreement ("BCA2") was concluded between Bernie and Elara on 14 February 2018 whereby Elara was appointed as agent to provide all necessary assistance with regard to the conversion of the Bonds into shares. BCA2 replaced a previous unsigned agreement between PBP and Elara ("BCA1"), and its precise effect and import were hotly disputed in the context of Prakash's "no loss" argument below. Suffice it at this stage to say that on the same date, when the share price was around INR 220, PBP served a conversion notice ("CN1") in respect of a principal amount of $4 million equivalent to 2,562,308 shares. Under the terms of the Bonds, Prakash was obliged to issue the shares within no more than 14 business days.[2] However, it failed to do so until 12 April 2018, by which time the market had dropped to around INR 195, albeit this was still well above the conversion price. The shares were then sold by Elara between 12 and 27 April 2018.

17. Further conversion notices were served by PBP on:

    i) 2 May 2018 (at which time the market price was INR 200) for a principal amount of US$4 million equivalent to 2,562,308 shares ("CN2"); and

    ii) 11 June 2018 (by which time the market price had fallen to INR 175) for a principal amount of US$3 million equivalent to 1,921,731 shares ("CN3").

18. There were again delays by Prakash in effecting these conversions and the shares for CN2 and CN3 were not issued until 10 September 2018, by which time the share price had fallen further to INR 156. There is a factual dispute between the parties as to whether Prakash was instructed by PBP to delay conversion under CN2 so as to process CN2 and CN3 together. This is addressed below.

19. The market thereafter continued to decline steeply. Sale of the shares issued under CN2 and CN3 proceeded very slowly and was eventually completed only on 11 June 2020. Hence PBP's complaint that because of the delays in issuing shares pursuant to CN2 and CN3, the proceeds of realisation were considerably less than would have been the case had they been issued in accordance with the contractual timescale.

20. It is common ground that no such complaint can be made in respect of CN1 as the market had in fact risen between the date when the shares ought to have been delivered and the date on which they were in fact delivered. However, PBP has an altogether more ambitious primary case which is that the delay in issuing shares pursuant to CN1 caused it to alter its entire trading strategy and that had the CN1 shares been issued in a timely fashion it would have been able to convert the totality of its bondholding while the market was still high and thus realise the shares at a significant profit.

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[2] A pleaded issue as to whether the relevant timescale was to be measured by business days or calendar days fell away during the course of the hearing following PBP's concession that it should be business days. A further dispute as to the correct start date for the fourteen-day period is addressed below.

21. As far as interest is concerned, it is not disputed that no coupon interest was payable under the Bonds on 1 April 2018 as the share price had exceeded the relevant limit for the preceding 30 trading days. The first instalment of interest therefore fell due on 30 September 2018. This was not paid and on 9 October 2018, Mayura Gangan of Elara emailed Mr Verma of Prakash requesting payment. Although the evidence did not make this clear, I assume that Mayura Gangan was a junior colleague of Joseph Mammen who seems to have been the responsible manager at Elara dealing with both Bernie and Prakash.

22. In response, Mr Verma of Prakash asked to be provided with the necessary bank details. This request was relayed by Mr Mammen to Bernie who responded on 14 October 2018 as follows:

"can you please tell them to wire the coupon payment for PBP's CB's and for Okommo Hld. CB's (only USD 100,000 in existence) via Elara to us. In other words, please ask them to wire the funds to Elara and then you wire them on to me. Currently the certificates are with you anyway, therefore, this is consistent from that point of view.

I don't want them to see my/our account, also I have no account for Okommo Hld., therefore, this is the best way to wire the funds."

23. The following day Mr Mammen informed Mr Verma that both PBP and Okommo Holdings had asked for the interest to be paid to Elara for onward disbursement to their accounts and stated that he would revert with the wire transfer details. On 17 October 2018, however, Mr Verma emailed Elara stating that Prakash could only pay the registered bondholder and repeating the request for bank details.

24. Mr Mammen passed this on to Bernie, who responded on 22 October 2018:

*"(1) For **PBP's Prakash coupon payment** please tell them to remit the funds to the following account*

Accountholder Name: PBP, Director B. Högel
IBAN: LU49 0080 3223 9010 2011
Account Number: 3223901
PBP has an Account with: Banque de Luxembourg, 14, boulevard Royal, L-2449 Luxembourg
SWIFT/BIC Code of Banque de Luxembourg: BLUXLULL

BdL has an Account with Deutsche Bank Trust Company Americas, New York (DBT)
Account Number of BdL with Deutsche Bank Trust Company Americas, New York: 04401506
SWIFT/BIC Code of DBT: BKTRUS33XXX
ABA of DBT: 021001033

*(2) For **Okommo Holding SA's Prakash coupon payment** please tell them to issue a cheque and to send it to you. After you have received it please cash it.*

The cheque to be issued in the following name:

Okommo Holding SA"[3]

25. These instructions were relayed to Prakash on the same day. The representation that Bernie was a director of PBP was, of course, untrue and potentially misleading.

26. On 25 October 2018, Mr Mammen and Mr Verma had a telephone conversation in which Mr Verma informed Mr Mammen that Prakash was under a contractual obligation to make payment of interest only in the name of the registered bondholder and that it therefore could not make any bank transfer unless the account name matched that of the registered bondholder. It appears that Mr Verma also indicated that Prakash did not have the facility to issue a US Dollar cheque. Mr Mammen passed this information to Bernie on the same day by means of a Skype call.

27. On 29 October 2018, Bernie wrote to BDL, again representing himself to be a director of PBP and instructing it:

> *"to accept the board Resolution of Peter Beck und Partner Vermögensverwaltung to credit the incoming Prakash CB Convertible Bond Coupon Payment to the private account of Bernd Högel (account number 3223901, IBAN: LU49 0080 3223 9010 2011) with Banque de Luxembourg."*

28. In cross-examination Bernie accepted that his representation to both Prakash and BDL that he was a director of PBP was false to his knowledge. His explanation was that he was simply trying to get the money credited, not to mislead anyone. Nonetheless, while accepting that the statement was incorrect, he was reluctant to accept that it amounted to a lie, claiming that he had not looked up the precise dictionary definition of "lie".

29. On 31 October 2018, Bernie emailed Mr Mammen instructing him to tell Prakash to remit PBP's interest payment to the same account previously identified but to use *"whatever [accountholder name] they want to use! If they say they need to make payment in the name of the registered holder, then let them use what they think they need to use!"* As far as Okommo's payment was concerned, Elara was to tell Prakash that Okommo had no bank account, and that Prakash must therefore issue a cheque. Mr Gangan thereupon emailed Mr Verma asking him to transfer the interest as soon as possible and informing him that *"the Bondholder has confirmed that you may transfer the funds in the name of the registered holder using the below details sent earlier."*

30. Prakash declined, however, to make payment and it is common ground that it did not pay any subsequent instalments of coupon interest as they fell due. As stated in paragraph 2.i) above, Prakash maintains that on a true construction of the Subscription Agreement it was not contractually obliged to make physical payment in these circumstances although it remains willing and able to do so should PBP provide details of a payment method which complies with the terms and conditions of the Bonds.

31. On 3 July 2019, PBP's Indian lawyers, Cyril Amarchand Mangaldas ("CAM") wrote to Prakash asserting that the non-payment of interest amounted to one or more Events of Default triggering PBP's right to accelerate the maturity of the Bonds. CAM accordingly demanded payment of the ERA and called for payment to be made into the

[3] Okommo Holding SA ("Okommo") was a company that was used by Bernie to hold a small number of Bonds.

same account as that set out in paragraph 24 above. All other existing or future rights and remedies were reserved.

32. Prakash's lawyer, Ashwani Kumar, responded on 10 July 2019 denying that any Event of Default had occurred.

33. Following a chasing letter on 11 July 2019, Mr Ashwani Kumar on behalf of Prakash again denied that there had been any default triggering an early redemption and pointed out that Prakash had asked for bank details in order to make the payment but had been provided with an account in a name different to that of the registered bondholder.

34. On 18 September 2019, CAM wrote once more to Prakash referring to its previous letters of 3 and 11 July 2019. It claimed that Events of Default had occurred by virtue of Prakash's failure (a) to pay interest on 1 April 2018,[4] 30 September 2018 and 1 April 2019, and (b) to issue shares in response to the Conversion Notices within the contractually stipulated time frame. This was the first occasion on which any formal complaint was made about the delays in conversion. CAM again called upon Prakash to pay the previously requested ERA which was now quantified in the sum of $14,501,451.[5] However, although it is clear that payment was being demanded, as before, into Bernie's personal account, the account holder name was now said to be *"PBP, Högel".*

35. Mr Ashwani Kumar's response on 25 September 2019 was to point out (amongst other things) that PBP had failed to address the non-conformity of the bank account with the name of the registered bondholder. He stated that even with the alteration in the name of the account holder, it still did not match that of the registered bondholder. He again denied that any Event of Default had occurred.

36. Perhaps unsurprisingly in these circumstances, no payment of interest was made by Prakash to PBP on 30 September 2019.

37. On 18 December 2019, Prakash issued the current proceedings seeking a declaration of non-liability and served its Particulars of Claim. PBP served its Defence and Counterclaim on 14 February 2020 seeking payment of the ERA and damages for late conversion.

38. On 27 February 2020, PBP sent a further precautionary Notice of Default to Prakash. This was expressed to be without prejudice to the earlier notices but alleged a further Event of Default in failing to pay the coupon interest due on 30 September 2019.

39. On 10 March 2020, PBP's solicitors, Signature Litigation LLP, emailed Prakash's solicitors, Hill Dickinson LLP, inviting payment of the outstanding interest (albeit without prejudice to PBP's counterclaim for the ERA) to the bank account previously identified or by cheque payable to PBP. This was the first occasion on which payment in respect of PBP's coupon interest had explicitly been requested by cheque.

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[4] This is acknowledged to have been incorrect as no interest was in fact due on 1 April 2018.

[5] Although nothing turns on it, in answer to my query as to how this sum had been calculated, I was informed by Mr Spink that it was erroneous in two respects: (i) it assumed that interest was payable on 1 April 2018; (ii) it assumed that PBP's bondholding was US$24.3 million rather than US$21.6 million.

40. Further precautionary Notices of Default were served on behalf of PBP following non-payment of interest on 1 April 2020, 30 September 2020, 1 April 2021 and 30 September 2021 respectively. All these notices were expressly sent without prejudice to PBP's case that the ERA was already due and payable pursuant to one or more of the previous Notices of Default.

The Issues

41. Against this background, the issues to be determined fall under the following broad heads:

ERA claim

i) Was Prakash in breach of contract in failing to pay coupon interest?

ii) Did Prakash commit an Event of Default within the meaning of Condition 10.1 entitling PBP to serve a Notice of Default, either by virtue of its failure to pay interest or its delay in issuing shares pursuant to the conversion notices?

iii) If so, did PBP waive its right to serve a Notice of Default in respect of one or more of those Events of Default, whether by delay or otherwise?

Late conversion claim

iv) Has PBP suffered the loss claimed or, if not, is it nonetheless entitled to recover substantial damages in respect of such loss?

v) What is the date of the relevant breach or breaches in respect of the claim for late conversion?

vi) What is the appropriate measure of damages in this case?

The Witnesses

42. I heard evidence on behalf of Prakash from Mr Tanuj Verma and Mr Ashwini Kumar and on behalf of PBP from both Bernie and Frank Högel. I also had the benefit of expert evidence from Mr Nicolas Corry for PBP and Mr Suny Mou for Prakash.

43. Both sides made serious criticisms of the other's factual witnesses and it is therefore appropriate that I should express my own views as to their credibility.

Claimant's witnesses

44. Until his retirement from Prakash in July 2019, Mr Verma was Senior Vice President, Finance of the company. He is now self-employed as a financial advisor and continues to work part-time for Prakash on a retainer. Mr Kumar is the Company Secretary of Prakash. Prakash was roundly criticised by Mr Spink QC (who appeared with Mr Saaman Pourghadiri on behalf of PBP) for not tendering any witnesses at board level. He said that this was a significant failing in the context not only of Prakash's decision not to pay coupon interest to Bernie's bank account as requested and/or its professed inability to pay by cheque, but also in relation to the recovery of damages for late

conversion, since what it knew or could reasonably have been expected to know about PBP's trading strategy was highly relevant to remoteness.

45. I reject this criticism. The scope of the necessary factual evidence on the Claimant's side was in fact very limited, being primarily relevant to the question of whether or not an instruction was given to Prakash to delay conversion pursuant to CN2 until CN3 had also been served. Mr Verma and Mr Kumar were the critical witnesses on this point. As far as remoteness was concerned, it was not suggested that anyone at Prakash, whether at board level or otherwise, knew or should have known the precise details of PBP's proposed trading strategy and the expert evidence is more than sufficient to enable me to make findings as to what a bond issuer in Prakash's position should reasonably have been expected to have in contemplation at the date of the Subscription Agreement.

46. Mr Spink's criticisms went further, however. He categorised Mr Verma's evidence as unreliable and unsatisfactory, pointing in particular to Mr Verma's alleged reticence in accepting that certain conversations which Mr Mammen reported to Bernie that he had had with Mr Verma had indeed taken place. He also suggested that Mr Verma had changed his evidence where he thought it expedient.

47. I do not accept this. Mr Verma readily accepted that he was the main point of contact with Elara and recalled some but not all of his conversations with Mr Mammen. Where the only direct evidence of a conversation was Mr Mammen's report to Bernie, it seems to me that Mr Verma was perfectly entitled to say that he could not himself remember the conversation and that he could not comment on what Mr Mammen was telling Bernie. In truth, his alleged vacillation and reticence amounted to no more than this. Nor do I accept that he changed his evidence. The instance cited by Mr Spink seemed to me to be based on a misunderstanding of the initial question put to him.

48. In short, I accept that he was a witness of truth giving evidence to the best of his recollection and ability. In my judgment he genuinely believed that Prakash was under no obligation to pay coupon interest in the circumstances which transpired. Whether or not that view was correct as a matter of law is, of course, a different matter.

49. I similarly found Mr Kumar to be a credible and truthful witness. Mr Spink did not accuse him of unreliability but submitted that his excuses for the delays in conversion did not withstand scrutiny. However, this does not bear on his credibility but rather on whether the Claimant's case is well-founded, which is a question for the court.

50. At various points in Mr Spink's written and oral submissions there were suggestions that Prakash had been deliberately obstructive in failing to pay interest and in delaying the share conversions. They were not pursued with any great vigour and there was no evidence to support them. I therefore discount them entirely, as I do the allegations of dishonesty and corruption levelled against Prakash by Bernie in his witness statements.

PBP's witnesses

51. I found Mr Bernie Högel to be a thoroughly unsatisfactory witness. His evidence constantly changed under cross-examination, and I am quite satisfied that on many points he was either not telling the truth or was being positively parsimonious with it.

He also showed himself to be someone who was prepared both to make false statements and to stand by and condone false statements by others when it suited his purposes.

52. One example, as appears from the narrative above, was his deliberate misrepresentation of himself to both Prakash and BDL as a director of PBP, knowing full well that this was not the case, in an attempt to persuade them to allow monies payable to PBP to be credited to his personal account. His resort to sophistry as regards the dictionary definition of a "lie" did not impress.

53. A similar instance was revealed by a sequence of correspondence in November 2017 in which PBP's Asset Manager, Mark Rooney, represented to another third-party institution that Bernie was the sole director of PBP. This again was in the context of an attempt (ultimately unsuccessful) to persuade the institution in question to permit payment into Bernie's personal account of an amount due to a group company. Under cross-examination, Bernie initially denied that he had ever seen this email or that it had ever been copied to him. He was forced to retract that denial when, upon turning the page, it was evident that the entire sequence of correspondence had been copied to him. He then asserted that he had never actually read the email before and that this was the first he knew about it. He also claimed to have no idea why Mr Rooney had said what he did.

54. I do not believe this for one moment. Given the degree of control that Bernie clearly exercised over the group and its investments, I would in any event have found it highly implausible that he did not pay the closest attention to anything and everything concerning payment receipts. However, it is frankly incredible in the light of his own near-identical misrepresentation to Prakash and BDL in September 2018 that he did not know exactly what was going on. I find that Bernie knew full well what Mr Rooney was saying. He also knew it to be untrue but was prepared to condone it and took no steps to correct the position because he thought it represented the only way of getting the relevant payment made.

55. A further example of his utter disregard for truthfulness in favour of expediency in his business dealings was exemplified by the circumstances surrounding the conclusion of BCA2 with Elara on 14 February 2018. This is dealt with in more detail below.

56. His evidence was also unsatisfactory in relation to PBP's accounts. The accounts before the court did not disclose assets which *prima facie* one would have expected to see recorded if they were owned (as claimed) by PBP. Save in relation to the Bonds themselves, this is not directly relevant to the present dispute and there may or may not be an explanation. If there was such an explanation which would satisfy the German tax authorities, then it was certainly not put before me. However, it is unnecessary to me to make any findings on the point. I merely note Bernie's evidence that he preferred to pay fixed penalty fines rather than have PBP file any accounts which publicly disclosed its assets.

57. Mr Kimmins QC (who appeared for Prakash with Miss Susannah Jones) further drew attention to the fact that the documents before the court contained a transcript of a single telephone conversation with Mr Mammen that Bernie had recorded. In an email to Mr Verma dated 5 January 2022, Mr Mammen said that he was unaware that any of his conversations with Bernie had been recorded. Bernie's explanation was that he had recorded this specific conversation to give to a friend who had expressed an interest in

convertible bonds and that he had probably not told Mr Mammen about the recording because *"nobody likes being recorded"*.

58. When asked whether he had recorded other conversations, his response was that there were "no other relevant recordings". On being pressed, he admitted that he possessed recording software but said that this was the only recording that had survived and that if he had recorded any other conversations, they must have been deleted. When asked whether he recorded all his conversations, he said that he would do so from time to time, but that the recording system did not always work, and that he would generally only keep the recordings for about a week to check his understanding before deleting them. It is therefore unclear why the recording of the conversation with Mr Mammen had not similarly been deleted once it had served its purpose or, to put it another way, why this was the only relevant recording to have survived. Mr Kimmins suggested nefarious intent and while I cannot go that far on the evidence before me, it is, on any view, an unexplained oddity.

59. All this said, I remind myself that because I may have found Bernie to be untruthful in some of his evidence to the court, that does not mean that I am bound to conclude that everything he said was untrue. Both in opening and throughout the hearing, Mr Kimmins made much of the findings of Hamblen J (as he then was) as to Bernie's lack of credibility in another case to come before the English courts: *Marksans Pharma Ltd v Peter Beck und Partner VVW GmbH*, [2015] EWHC 1608 (Comm). I should emphasise, however, that I have reached my own conclusions as to Bernie's worth as a witness on the basis of the evidence given before me and entirely without regard to the views of another judge on different evidence in a different case.

60. Nonetheless, my independent assessment of Bernie is similar to that of Hamblen J and I approach his evidence with a healthy dose of scepticism and on the basis that in relation to points of dispute the Claimant should generally have the benefit of the doubt in the absence of independent corroboration.

61. As for Mr Frank Högel, I did not find him to be a particularly co-operative or candid witness. In truth, however, he had little of relevance to contribute. In his written statement, he claimed that he saw his role as being to liaise with the company's shareholders about the company's investments, but since Bernie was the principal shareholder together with his wife and children, this seemed to be a rather strange way of putting things. In fact, it was clear to me that he acted under the direction of Bernie and did whatever Bernie wanted him to do. His oral evidence was that there were no formal meetings between him and Bernie and that they usually spoke by Skype or telephone. Bernie basically had an entirely free hand in relation to investments and Frank's role was simply to deal with administrative and tax matters in Germany. The following evidence makes it abundantly clear who was pulling the strings:

> *"A. It is more ad hoc. If something really is bothering me of course, I will call him. If I think he is not, in the way he gives the -- or I have given the authority but, you know, if something is very important he will call me and tell me what is going on and I'm in the picture then.*
>
> *You cannot say -- I wouldn't say regularly we call every four weeks, it could be in a week time twice and it could be the next whatever, two months then that we speak not, if it's not important.*

> *Q. I see. Would you say it was very much Bernie who took the lead role in relation to these bonds, correct?*
>
> *A. Yes, because he is the investment decision-maker. He always speaks to me on things, if we should do generally an investment in India and how much. But then basically I am not -- I am not saying -- sometimes I disagree if he does something. I would say, right, but most if the time we would speak about if he does an investment. But when an investment is done, then he does everything on his own. So I am not talking to brokers or somebody else, basically.*
>
> *Q. I see. So once the investment had been done in this case, all you really did was fill in the forms that he told you to fill in, correct?*
>
> *A. Which forms are you talking about?*
>
> *Q. Like those that we were looking at on the screen a moment ago, the conversion notices etc?*
>
> *A. The conversion notices? I spoke with him on the phone to put that stuff in and then he emailed it to me and then I signed it, because I am the sole director of Peter Beck of course."*

62. Frank too showed a remarkable lack of concern about signing misleading documents. He was adamant that the beneficial ownership of the Bonds always remained with PBP and never changed. When pressed with the fact that this meant that BCA2 was misleading, he said that it did not really matter what was in the document because everything was done on behalf of PBP. His evidence as to whether he ever spoke to Bernie about the fact that BCA2 contained misrepresentations was evasive. He was unwilling to answer at all until the court intervened and then attempted to parry all questions by saying that they should be directed to Bernie.

Joseph Mammen

63. Both sides put in Civil Evidence Act Notices in relation to short email communications from Mr Mammen. The position of Elara and particularly that of Mr Mammen was somewhat concerning. On any view, he was party to a document, BCA2, which he must have known was untrue but which he seems to have suggested as a means of getting around Elara's internal compliance requirements to allow payment of the share proceeds to be made to Bernie's personal account. Pursuant to both the unsigned BCA1 and the signed BCA2, Elara was also prepared to assume a role as agent for Bernie/PBP at a time when it was already acting as Lead Manager for Prakash, but without disclosing this fact. This put it in a position of clear conflict which required explanation.

64. However, neither side sought to call Mr Mammen as a witness and Bernie's evidence was that Elara and Mr Mammen were very reluctant indeed to become involved. In circumstances where Mr Mammen was to some extent running with the hare and hunting with the hounds, it is perhaps unsurprising that he had no desire for his conduct to be scrutinised in court. But he is not here to answer for himself and it would be unfair for me to make any findings. Suffice it to say that I am not prepared without more to accept his uncorroborated assertions, such as his claims to Bernie that he was pushing Prakash to expedite the conversions.

Experts

65. The scope of the expert evidence was essentially limited to quantum and the profits that could reasonably have been expected to be made on conversion in different hypothetical scenarios. The experts on both sides were eminently well-qualified to give evidence on this matter and I was satisfied that they were both credible and honest witnesses who were doing their best to assist the court in what was admittedly a speculative exercise.

66. In closing, Mr Spink sought to suggest that Mr Mou had not adopted a sufficiently balanced approach but I reject this criticism. Mr Mou set out clearly the basis on which he was stating his opinions. He was able to justify every assumption that he had made but openly stated in his report that others might disagree with him. In so far as he expressed opinions on the length of time that conversion could be expected to take, he made it abundantly clear that these were based on his practical experience and not on the correct legal construction of the Subscription Agreement.

67. In short, I do not find any reason to give his evidence less weight than that of Mr Corry.

Disclosure

68. Finally, I should say something about PBP's disclosure. As explained above, PBP was only one of several entities controlled by Bernie. His almost obsessive concern to preserve confidentiality in respect of these other entities had the unfortunate consequence that many of the documents before the court were heavily redacted and, as a result, were hard to comprehend. On behalf of Prakash, Mr Kimmins directed a number of trenchant criticisms at Bernie and PBP in relation to disclosure and referred to its apparent unwillingness to put the full picture before the court. These criticisms were equally trenchantly rejected by Mr Spink. In the event, Mr Kimmins clarified that Prakash would not be inviting the court to draw adverse inferences in relation to redactions but maintained his submission that the documents in their redacted state were virtually incomprehensible and that PBP had only itself to blame if it found itself unable to prove its case as a result.

69. Against this background, I now turn to the issues in the case.

ERA claim

70. Conditions 7.1 and 7.2 of the Subscription Agreement expressly addressed the means by which payment of coupon interest was to be made, namely *"by transfer to the registered account of the Bondholder or by US dollar cheque drawn on a bank in New York City mailed to the registered address of the Bondholder if it does not have a registered account, in each case in accordance with provisions of the Agency Agreement."* There was thus a clear hierarchy of payment methods. If the Bondholder had a registered account, payment was to be made to that account by transfer. Only if it did not have such an account was payment to be made by cheque.

71. It was common ground between the parties that while the Subscription Agreement did not positively prohibit payment in some other way, this would have had to be the subject of specific agreement and that there was no such agreement in this case. In the vast majority of cases, of course, there would be no need to resort to making payment in

some other way. The problem has only arisen in this case because PBP did not have a bank account of its own into which either a transfer could be made or a cheque be paid.

Bank transfer

72. The first question is whether in those circumstances, there was any obligation on Prakash to make a bank transfer into the account nominated by PBP.

73. The meaning of *"registered account"* was defined in Condition 7.2. There can be no serious dispute that the definition applies equally to Condition 7.1. Thus, references to the Bondholder's *"registered account"* in both Condition 7.1 and Condition 7.2 must mean a registered account as so defined.

74. In my judgment this is a binary matter. Either the account registered in Elara's books complies with the definition, in which case is it a *"registered account"* for the purposes of any transfer, or it does not, in which case payment must be made by cheque. Despite Mr Kimmins' submissions to the contrary, I fail to understand how a bondholder can have an account in the register which does not comply with the definition – and so absolves Prakash of the obligation to pay by bank transfer – but is nonetheless to be regarded as a "registered account" so as to absolve Prakash also of the need to pay by cheque. This would be a bizarre construction to put on the agreement and would create a black hole where there is absolutely no need to do so. It smacks very much of trying to have one's cake and eat it and I reject it.

75. However, the argument cuts both ways and I conversely reject Mr Spink's submission that one need look no further than the register in order to be satisfied that the account there recorded was compliant with the definition. That, it seemed to me, was a completely circular argument. Absent express agreement, what is recorded in the register cannot possibly be conclusive as to whether the account complies with the definition in every particular. I put it to Mr Spink that the registrar might make a mistake or be suborned into mis-recording the details and his only answer was to say that Prakash would nonetheless be bound to pay to the account shown in the register but that the bondholder who should have been (but, *ex hypothesi* was not) paid might then have a claim against Prakash who would in turn have a claim against Elara. This did not seem to me to be at all a satisfactory or commercial construction to put on the agreement.

76. In short, therefore, the effect of Conditions 7.1 and 7.2 in my judgment is that the obligation to pay by bank transfer arises only in the event that the account registered for PBP in Elara's books complies with the contractual definition in Condition 7.2.

77. As to this, both parties agreed that the reference in the definition to a New York bank was to recognise the possibility that a bondholder might not have its own account in New York and to accommodate payment through a correspondent bank. They also agreed that, although BDL in this case held its Deutsche Bank dollar account in New York in its own name, it could be regarded as holding that account on behalf of the local BDL account for which payment was ultimately destined. Mr Kimmins accordingly submitted that the destination account at BDL must itself be held *"by or on behalf of"* PBP.

78. Clearly BDL account no. 3223901 was not held *by* PBP; on the contrary, Bernie accepted that it was and always had been his personal account and that he was and always had been the sole account holder. However, Mr Spink argued that where a bank permitted an account to be used for the purposes of receiving and paying out money on behalf of third parties other than the account holder, it was necessarily maintaining the account *on behalf of* those third parties. He referred me to a number of documents which appeared to show payments to and from PBP being made via Bernie's account and submitted that since Bernie used it, and BDL permitted it to be used, to receive payments destined for PBP, it should be regarded as an account maintained on behalf of PBP whether viewed through the eyes of the account holder or the bank.

79. I note that many of the documents relied upon were post-contractual and thus lacked any probative value as to the position at the date of the contract which is, of course, the relevant date for any exercise in construction. Moreover, they were all heavily redacted, and it was by no means clear to me that references to *"PBP"* were necessarily to be understood as references to the Defendant rather than to some other entity which used the Peter Beck name. But even assuming in Mr Spink's favour that the documents do establish payments to and from PBP, I agree with Mr Kimmins that this is not sufficient.

80. Bearing in mind the regulatory environment of modern-day banking operations and the need for banks to be able to demonstrate compliance with KYC and AML requirements, it seems to me that the words *"maintained by or on behalf of"* connote some degree of formality. Even Bernie accepted that the situation was problematic, hence his resort to the subterfuge that he was a director of PBP in order to secure payment into his personal account.

81. To my mind, a joint account or a trust account held in the name of a trustee on behalf of a named beneficiary would fall within the definition. In either of these situations, all necessary KYC or AML checks could be satisfactorily performed. However, this was Bernie's personal account and the fact that he had persuaded BDL to allow payments to be made to it for the ultimate benefit of PBP (and other entities) does not make it an account *"maintained"* on behalf of PBP rather than an account which was merely used by the account holder for the purposes of PBP and others. The more so, where Bernie's misrepresentation that he was a director of PBP may have played a significant part in BDL's acquiescence in this practice.

82. Indeed, if BDL genuinely thought that the account was held on behalf of PBP, it is difficult to understand why it was reluctant to allow payments for PBP to be made into it without there also being a specific reference to Bernie. I note that BDL's letter of 22 November 2017 agreeing to accept payment into Bernie's personal account for the benefit of another of Bernie's companies clearly proceeds on the assumption that the account was his *personal* account but that an exception was being made because BDL had been led to believe (i) that the company's previous account (now closed) had been used by Bernie as if it were a personal account; (ii) that he was the only beneficial owner of the company and had signatory power in respect of it; and (iii) that Bernie would be named as a joint intended beneficiary of the payment. BDL further insisted on being provided with a resolution from the company in question authorising payment into the account.

83. The fact that Elara may have been content from its own compliance perspective to pay the proceeds of the sale of the shares much later to Bernie's personal account is neither here nor there.

84. It follows that the account shown in the register, namely BDL account no. 3223901 was not PBP's *"registered account"* within the meaning of the contractual definition. Accordingly, Prakash was not required to make payment of the coupon interest by bank transfer to that account and while it could, of course, have agreed to do so as a concession, it was under no obligation so to agree.

85. It is therefore not strictly necessary to deal with a further point which was raised in argument as to whether an account in the name of "PBP" would have sufficed, or whether there had to be exact correspondence with the registered name of the Bondholder, namely Peter Beck und Partner Vermögensverwaltung GmbH. In opening, Mr Spink drew a desperate picture of the commercial difficulties which would arise if precise correspondence was required. I am not persuaded that the situation was as bleak as he portrayed it. In my view, the degree of correspondence required between the registered name of the bondholder and the name of the account holder is no more or less than that required by the doctrine of strict compliance in the context of documentary credits. Where, as here however, there were at least two entities trading under the Peter Beck name, I would have required some persuasion to hold that an account simply in the name of "PBP" without more was sufficient.

86. Mr Kimmins also relied heavily on the provisions of clause 4 of the Agency Agreement which stipulated that payments should be made *"in the name of the registered Bondholder only".* Given my findings above, the Agency Agreement takes the matter little further, although I agree that it was an integral part of the contractual arrangements between the parties, as demonstrated by Condition 15.2 of the Subscription Agreement which permitted only limited amendments to be made to the Agency Agreement without the agreement of the bondholders. However, I agree with Mr Spink that the words quoted above refer simply to the payment instruction, i.e., the payment that is to be made, not to the means by which or the account into which it is to be paid. I therefore see no reason why a payment in the name of PBP cannot be made into any account that the parties might agree on. In this case, their agreement was formalised in Conditions 7.1 and 7.2, but if Prakash had been willing to pay into Bernie's personal account, it does not seem to me that Clause 4 would have been an impediment. So construed, there is no inconsistency between Clause 4 of the Agency Agreement and Conditions 7.1 and 7.2 of the Subscription Agreement.

Payment by cheque

87. The evidence was that Prakash has no facilities to issue US Dollar cheques of its own. It could have procured a banker's cheque, but this would apparently also have required an account number to be provided. In my judgment, this is irrelevant. As a matter of construction, the cheque option was clearly intended to be a catch-all payment method in the event that a bondholder could not provide appropriate bank details for a transfer. It cannot therefore sensibly be construed as likewise requiring a compliant bank account to be provided otherwise payment by bank transfer would be possible and it would add nothing.

88. Condition 7.1 required payment (whether by transfer or cheque) to be made in accordance with the provisions of the Agency Agreement. I have held above that clause 4 of the Agency Agreement simply required any cheque to be made out to the name of the registered bondholder. It follows that Conditions 7.1 and 7.2 require neither more nor less.

89. I therefore reject the argument that because *Prakash* had no means of paying by cheque without bank account details, then, absent agreement between the parties on some alternative payment mechanism, there was no obligation to make payment at all. If Prakash did not have the facilities to issue a simple US Dollar cheque, it should not have undertaken an obligation to do so. Having undertaken that obligation, however, it failed to pay by cheque and was accordingly in breach of contract.

Waiver of right to payment by cheque

90. Prakash further argued that PBP had in any event waived its right to demand payment by cheque. It drew attention to the fact that PBP had consistently demanded payment by bank transfer until 10 March 2020, when it requested cheque payment for the first time. In stark contrast, payment to Okommo had been requested by cheque from the outset.

91. Mr Kimmins put his case primarily on the basis of election. However, I fail to see how election is relevant in this context. A right of election arises where a party has to choose between two inconsistent courses of action, for example an innocent party in the face of a repudiatory breach of contract must elect whether to terminate or affirm. But there was no such choice here. Payment by transfer and payment by cheque were not true alternatives, since payment by cheque only arose as a possibility if there was no registered account permitting a bank transfer.

92. In any event, even if PBP initially demanded payment in an uncontractual manner, namely to Bernie's personal account, I do not see that this precludes it from subsequently demanding payment in a contractual manner in circumstances where a bank transfer cannot legitimately be made. There was therefore no waiver by election.

93. Mr Kimmins alternatively sought to support his argument by an appeal to estoppel but this was equally misdirected. I accept Mr Spink's submission that in circumstances where PBP had been expressly told by Mr Verma that Prakash could not issue a cheque, merely repeating a request for payment by bank transfer cannot constitute an unequivocal representation that PBP would never accept payment by cheque. Moreover, if, as appears to have been the case, Prakash could not issue a cheque anyway (other than a banker's cheque which required the provision of bank account details), there can have been no reliance on the supposed representation. And, lastly, even if the ingredients for an estoppel were otherwise made out, it would hardly have been inequitable, in the face of an admitted debt, for PBP to have resiled from its previous insistence on payment by bank transfer and to have sought payment by cheque instead.

94. The logic of Prakash's entire case in this respect is that it can escape all liability for failing to pay an admitted debt – potentially to the crack of doom. This is such an uncommercial position that one feels instinctively that it cannot be right. For the reasons given above, I am satisfied that it is not right.

Event of default

95. On the basis that Prakash was in breach of contract in failing to pay the coupon interest by cheque, the next question is whether that failure amounted to an Event of Default entitling PBP to demand payment of the ERA.

96. Under Condition 10.1 of the Subscription Agreement the right to trigger an ERA depended upon (a) the occurrence of an Event of Default which (b) was continuing at the date notice was given.

97. Condition 10.1 then set out the contractually agreed Events of Default. These included default in payment of interest for a period of fifteen business days (Condition 10.1.1) and failure to deliver shares as and when required after conversion (Condition 10.1.2). In his written opening submissions, Mr Spink also relied on Condition 10.1.3 but since this is in terms confined to a failure to perform or comply with *"**other** obligations, covenants, conditions or provisions"* under the Bonds or the Subscription Agreement, it can have no application where the circumstances fall within the more specific provisions of either Condition 10.1.1 or Condition 10.1.2.

98. There can be no doubt that Prakash had committed Events of Default within both Condition 10.1.1 and Condition 10.1.2. The more important question, however, was whether those Events of Default were *"continuing"* at the date when Notice of Default was first served. Since 10.1.3 had no direct application, the reference in that provision to defaults *"incapable of remedy"* was strictly speaking irrelevant. However, both parties prayed in aid the concept of remediation when attempting to elucidate the concept of continuing breach. This led to an interesting discussion about the relationship between the two. Is remediation only conceptually possible in the case of continuing breaches? If the breach does not continue, what is there to remedy? I was referred to the following passage in *Fuller: The Law and Practice of International Capital Markets* at para. 8.73:

> *"It is common for acceleration to be available only if the event of default is 'continuing'. This is to prevent the holder or the trustee having, in effect, a 'rolling put' (ie a permanent right of acceleration) for the rest of the life of the bonds once an event of default has occurred, even though it may subsequently have been remedied."*

However, this seemed to me merely to beg the question.

99. There is always a risk that imprecision of language can lead to imprecision of analysis and in my view especial care needs to be taken with the use of the term "continuing breach". On the one hand, it could mean a continuing wrong which gives rise to a continuing cause of action: see, for example, *Chitty on Contracts (34th ed., Sweet & Maxwell)* para. 29-015. On the other, it could mean that the consequences of the breach continue even though the breach occurred at a single point in time and the cause of action accrued at that date.

100. In my view, this is the distinction which Lord Reid had in mind in *Schuler v Wickman Machine Tool Sales Ltd*, [1974] AC 235, 249 in the context of a clause which applied to breaches which were capable of being remedied:

> *"The question then is what is meant in this context by the word "remedy." It could mean obviate or nullify the effect of a breach so that any damage already done is in some way made good. Or it could mean cure so that matters are put right for the future. I think that the latter is the more natural meaning. The word is commonly used in connection with diseases or ailments and they would normally be said to be remedied if they were cured although no cure can remove the past effect or result of the disease before the cure took place. And in general it can only be in a rare case that any remedy of something that has gone wrong in the performance of a continuing positive obligation will, in addition to putting it right for the future, remove or nullify damage already incurred before the remedy was applied. To restrict the meaning of remedy to cases where all damage past and future can be put right would leave hardly any scope at all for this clause. On the other hand, there are cases where it would seem a misuse of language to say that a breach can be remedied. For example, a breach ... by disclosure of confidential information could not be said to be remedied by a promise not to do it again."*

101. In the present case, while the Subscription Agreement stipulated a date for the payment of interest, this was not a once-for-all affair in the sense that it was a terminal date for payment. Indeed Condition 7 expressly contemplates that interest might not be paid on time, in which case default interest becomes payable. A failure to pay interest is therefore a genuinely continuing breach which can in principle be remedied by the payment of all outstanding amounts.

102. By contrast, the Subscription Agreement provided that shares following a conversion were to be delivered by *no later than* the stipulated date. It is therefore difficult to see how a breach of that obligation can either continue or be remedied. The issuer is late and that is that. Only the *consequences* of the breach can be remedied by belated delivery of the shares. However, if it is right that there is no continuing breach after the due date, then Condition 10.1.2 becomes all but meaningless because the bondholder has only a *scintilla temporis* in which to serve a Notice of Default. This strongly suggests to me that the requirement in Condition 10.1 for the breach to be continuing is looking to the consequences of the breach rather than the breach itself – in the words of Lord Reid, putting the matter right for the future. This makes commercial sense, since it concentrates on the substance of the obligation, namely the delivery of the shares, rather than the ancillary matter of timing. I do not accept the suggestion in Mr Spink's written closing submissions that late delivery of the shares was not permitted at all under the contract. That, to my mind, would be an unworkable construction. On his argument the bondholder would undoubtedly have an action for damages for late delivery but it is completely unclear what would happen to the shares themselves in those circumstances.

Waiver of right to serve Notice of Default in respect of late conversion

103. Even if Mr Spink was correct, I am quite satisfied that acceptance of late delivery precludes subsequent service of a Notice of Default for late conversion. Clearly such a notice could not relate to the converted shares themselves which, on this hypothesis, had been accepted, and it would be wholly uncommercial if a bondholder could nonetheless trigger an ERA for the remaining Bonds because shares which it had previously accepted had been delivered late. This would indeed exhibit the vice of the *"rolling put"* to which Fuller refers in the passage quoted above.

104. In my judgment, therefore, Condition 10.1.2 entitles the bondholder to serve a Notice of Default at any time after the due date but only up to such time as the shares are in fact delivered. In the present case, all the shares in question were delivered before any Notice of Default was served. It follows that PBP cannot rely on the late conversions as justification for triggering an ERA.

105. But in any event, PBP quite clearly waived any right to trigger an ERA on the basis of late conversion by virtue of its demands for payment of coupon interest in October 2018. Assertion of a right to interest on the basis that the Bonds are still in existence is wholly inconsistent with a right to accelerate the maturity of the self-same Bonds. I reject Mr Spink's argument that the interest payable was less than the amount of the ERA and that a demand for a lesser amount of interest was not inconsistent with a right to insist on payment of a larger amount by way of ERA.

Waiver of right to serve Notice of Default in respect of non-payment of interest

106. In relation to the failure to pay interest, Prakash's case was that PBP's delay in serving Notice of Default amounted to waiver of its right to do so. PBP's riposte was that any such argument was precluded by the provisions of Conditions 12.6 and 12.7.

107. Ultimately, Mr Spink did not dissent from the proposition that Condition 12.6 (as appears from its wording) applied only to the negative sin of omission and did not exclude the possibility of waiver by positive acts. Thus, in *Tele2 International Card Company SA v Post Office Ltd*, [2009] EWCA (Civ) 9, a similarly worded clause was held not to prevent an affirmation by performance. Likewise, it seems to me that a demand for contractual performance from the other party, such as a demand for payment of a subsequent interest instalment would go well beyond mere delay or omission and amount to a positive waiver of the right to rely on failure to pay an earlier instalment as an Event of Default.

108. Mr Kimmins relied on certain comments of Rix LJ in *Force India Formula One Team Ltd v Etihad Airways PJSC*, [2010] EWCA (Civ) 1051 at [113] and [122] to the effect that if the innocent party delays for too long, there may come a time when the law treats him as having affirmed the contract. This may well be so, but whether it is or not will depend very much on the particular circumstances and I accept Mr Spink's submission that, against the background of the parties' specific agreement to Condition 12.6, it would have to be a very clear case indeed before mere delay could be regarded as affirmative here.

109. Turning to Condition 12.7, Mr Kimmins' case was not that PBP had waived any Event of Default in itself. Rather he argued that it had waived the right to serve a Notice of Default in respect of those events. I agree with him that Condition 12.7 has no application in those circumstances and Mr Spink did not argue to the contrary.

110. As to whether there had been any relevant waiver on the facts, I note that on 14 November 2018, Bernie expressly instructed Mr Mammen not to complain to Prakash about the late payment of interest. The terms in which he did so made it abundantly clear that he was well aware of his right to trigger an ERA once a certain time had elapsed but preferred to hold off for the time being. Elara was of course the agent of Prakash in relation to the Bonds and the payment of interest. It would therefore be sufficient for the purposes of waiver that any act of affirmation crossed the line between

Bernie and Mr Mammen. However, I am satisfied that this instruction went no further than a *"delay or omission … to exercise any right or remedy accruing upon any Event of Default"* within Condition 12.6 and accordingly did not constitute any waiver in itself.

111. The first relevant notice in this case was not served until 3 July 2019. This explicitly referred to discussions between Elara and Prakash in relation to delayed coupon payments *"enclosed as Annexure 1 hereto."* It asserted that these non-payments amounted to Events of Default and called for payment of the ERA while at the same time reserving *"all rights and remedies which PBP may now have or have in the future under the Facility Agreements."* An oddity of this notice is that the attached correspondence only related to the non-payment of the 30 September 2018 interest instalment. No mention was made of the further interest which had become payable on 1 April 2019.

112. Ultimately, however, it seems to me that this makes no difference. In my judgment, Mr Spink was correct in his submission that service of a Notice of Default on the basis of a particular Event of Default does not prevent later reliance on another *pre-existing* Event of Default as justification for the same notice. He nonetheless accepted, also correctly, that PBP could not rely on a different, *later*, Event of Default as triggering the ERA without waiving the previous notice – at least in the absence of any reservation of rights as to the effectiveness of the previous notice. Thus, even if the notice is construed as relying only on the non-payment of interest in September 2018, PBP would be entitled to justify it by reference to non-payment of the April 2019 interest, even without the express reservation of rights which in any event puts the matter beyond doubt.

113. It was not suggested by Prakash that the right to serve a Notice of Default was waived other than by virtue of delay. The only question therefore is whether the delay in serving this notice was so great as to amount to a positive act of affirmation such as to take the case outside the scope of Condition 12.6. Reliance on silence or omission as a positive act of affirmation is an ambitious submission at the best of times but, even recognising with Rix LJ that there may come a time when it does, the circumstances would have to be exceptional to overcome the hurdle of Condition 12.6. Bearing in mind also that 15 business days had to elapse before an Event of Default could be declared, the relevant delay from the non-payment of the 1 April 2019 coupon interest was only just over two months. In my judgment, this comes nowhere near qualifying as "exceptional".

114. I am therefore satisfied that there was no waiver by delay of the right to declare an Event of Default on 3 July 2019 for non-payment of previously accrued interest instalments.

115. Had it been necessary to do so, I would have held that the 3 July 2019 notice, based as it was on non-payment of interest, was inconsistent with any prior acceleration or right to declare an Event of Default on the basis of the late conversion of the shares which had, of course, occurred prior to 30 September 2018. For the reasons given above, however, PBP was in any event precluded by its acceptance of the shares from serving Notice of Default on this basis.

116. It follows that the 3 July 2019 notice was valid and effective to trigger payment of the ERA. PBP therefore succeeds on this aspect of its case.

117. Mr Kimmins accepted that if PBP succeeded in relation to the 3 July 2019 notice, his arguments in relation to the subsequent notices (all of which were precautionary and which, from 27 February 2020, expressly reserved PBP's rights in respect of previous notices) fell away. It is therefore unnecessary for me to deal with these other than very briefly:

i) 18 September 2019: This notice expressly referred to the failure to pay coupon interest on 30 September 2018 and 1 April 2019 and also, for the first time, to late conversion. It also referenced the 3 July 2019 notice and called for payment of the ERA which had been thereby triggered. As such, it goes no further than the 3 July 2019 notice and must stand or fall together with it. If I had concluded that the earlier notice had been served too late to be effective, a later notice could hardly have improved PBP's position, while if (as I have held) it was not, then the September notice was unnecessary.

ii) 27 February 2020: This notice expressly demanded payment of the coupon interest due on 30 September 2019. It would therefore have been wholly inconsistent with the right to trigger an ERA in relation to earlier interest instalments but for the fact that it was served on a precautionary basis under a reservation of rights. I also note that by this time PBP had served its Counterclaim in these proceedings relying, amongst other things, on the 3 July and 18 September 2019 notices. It is therefore very difficult in any event to construe this letter as a waiver of those earlier notices. The relevant delay in serving the notice is in the order of four months. Again, I do not consider this sufficient to amount to a positive act of affirmation outside the scope of Condition 12.6.

iii) 18 June 2020: This notice demanded payment of the coupon interest due on 1 April 2020 and the relevant delay was approximately eight weeks. The same comments apply as in relation to the 27 February 2020 notice.

iv) 7 October 2020: This notice demanded payment of the coupon interest due on 30 September 2020. However, it was served before the relevant 15 business day period had expired and I accept Mr Kimmins' submissions that it was therefore premature and ineffective.

v) 15 June 2021: This notice demanded payment of the coupon interest due on 1 April 2021 and the relevant delay was approximately seven weeks. The same comments apply as in relation to the 27 February 2020 notice.

vi) 26 October 2021: This notice demanded payment of the coupon interest due on 30 September 2021 and was served within days. In no sense could it be said that there was any waiver in relation to this notice and Prakash accepted that it was a valid Notice of Default should breach be established.

Late Conversion claim

No loss

118. PBP was the registered holder of the Bonds and the contracting party with Prakash. Mr Kimmins nonetheless mounted a sustained attack on the basis that the relevant loss was in fact suffered by Bernie as the true beneficial owner of the Bonds and/or the shares and proceeds of sale.

119. There were many possible permutations to the argument, and I have to say that I was left in some doubt at the conclusion of the hearing as to precisely which analysis Mr Kimmins was inviting me to adopt. The most obvious possibilities seem to be as follows:

i) PBP was and at all times remained the legal and beneficial owner of the Bonds and, subsequently, the shares. This situation poses no problem. Clearly PBP has suffered the loss in question.

ii) PBP was and at all times remained the legal owner of the Bonds and the shares but held them on trust for Bernie. If this is the true analysis, then I have some difficulty in understanding quite where it gets Mr Kimmins, since PBP as trustee would undoubtedly have *locus* to recover its beneficiary's loss, even if it was obliged to hold any recoveries on trust for Bernie: see, for example, the comments of Millett LJ in *L/M International Construction Inc. v The Circle Ltd Partnership* (1995), 49 Con LR 12, 19.

iii) PBP transferred legal and beneficial title to the Bonds to Bernie by virtue of BCA2 or otherwise. In this situation, the transfer would have preceded any breach of contract and there is an argument that only Bernie would have suffered any substantive loss arising out of the late conversion of the shares and that PBP would be entitled to nominal damages at most.

iv) PBP transferred only beneficial title to the Bonds by virtue of BCA2 or otherwise. In this scenario, it seems to me that PBP as the legal owner of the Bonds would likewise have become the legal owner of the shares, albeit on trust for Bernie. The situation is therefore to all intents and purposes the same as in ii) above.

v) Irrespective of the legal or beneficial ownership of the Bonds, PBP vested legal and beneficial title to the shares in Bernie by virtue of BCA2 or otherwise. This scenario would lead to materially the same result as in iii) above. However, the transfer would have to be of both legal and beneficial title; mere transfer of the legal title to the shares would not be sufficient if Bernie only held them on behalf of PBP.

120. Which, if any, of these scenarios is disclosed by the evidence? It is not in dispute that PBP was the registered holder of the Bonds. Condition 2.2 further provides that the registered holder will be treated as the absolute owner for all purposes regardless of any notice of trust. It is clear that this provision, whether as a matter of contractual agreement or, in the modern parlance, contractual estoppel, precludes any argument as between PBP and *Prakash* that PBP was not the owner of the Bonds so far as questions of title were concerned.

121. However, I do not read it as saying that the Bonds cannot in fact be held in trust as between PBP and *Bernie*. To the contrary, the express reference to notices of trust

seems to contemplate precisely this situation. Nor does Condition 2.2 extend any further than the ownership of the Bonds themselves. It is not on its face inconsistent with the possibility that, following a conversion, the relevant shares might be held on trust for a third party. Thus, if in fact the Bonds were held by PBP on trust for Bernie, *prima facie*, the shares and any relevant proceeds would likewise be held on the same basis and, to my mind, Condition 2.2 does not prevent Prakash from so arguing.

122. The first question is whether the Bonds were indeed held beneficially by Bernie, whether from the outset or following some transfer of beneficial ownership. In this context, Mr Kimmins drew attention to the fact that, historically, the cash for the purchase of the original 2009 bonds came from Bernie and that Bernie had also funded further purchases of the 2010/2015 bonds. He noted that when PBP subscribed to the Bonds, its existing 2010/2015 bonds were transferred to Elara for surrender from Bernie's personal account. He also relied on the fact that PBP had for some years been languishing in a process of liquidation during which time it was apparently inactive. He suggested that this was inconsistent with PBP enjoying any beneficial ownership.

123. However, these matters do little more than demonstrate that Bernie was using various corporate structures to facilitate his investment strategy. He may have been the major shareholder of PBP but that does not mean that Prakash can simply ignore all concepts of separate corporate personality and treat him as its *alter ego*. There was in any event no pleaded case to that effect. But if Bernie was (effectively) the sole shareholder of PBP and if (as seems to have been the case) the company's sole director, Frank, was happy to act at his direction, then he did not require beneficial ownership of the company's assets in order to have total control over what happened to them. There was therefore no commercial necessity for any trust to be created. Indeed, the transfer of the 2010/2015 bonds to Elara was expressly said to be *"on behalf of"* PBP which is consistent with the fact that Bernie had been granted a power of attorney in 2015 to operate PBP's securities trading account with Goldin Equities on behalf of the company.

124. There is therefore nothing in any of this to suggest that the 2010/2015 bonds were held beneficially by anyone other than PBP and although Mr Kimmins complained about the lack of disclosure on this point, ownership of the 2009 and 2010/2015 bonds was never an issue for disclosure in the case. It may well be that PBP's beneficial ownership of the Bonds and, indeed, the previous bonds, should have featured somewhere in its accounts, notwithstanding the liquidation procedure. However, there was insufficient evidence for me to conclude that the reason for this was that they were not beneficially owned by PBP rather than that they were being kept off the books for some other less creditable, or possibly entirely legitimate, reason. Neither side adduced evidence of German tax law on this point.

125. As for the "liquidation", I am not persuaded that I can draw any inferences from the sketchy evidence that some sort of liquidation procedure was commenced but not ultimately followed through. Again, there was no evidence of German law before me as to the nature of such a procedure or its effect on the company's ability to trade. Whatever the nature of the beast, it certainly does not appear to resemble liquidation in the sense that English lawyers would understand it, not least because the appointed liquidator was the company's sole director.

126. In these circumstances, I am unable to conclude that the Bonds were held beneficially by Bernie from the outset. Nor am I persuaded that the beneficial ownership was *"in the ether… free to be allocated to whoever seemed most expedient"* as Mr Kimmins alternatively suggested in his closing submissions. Legal and beneficial ownership go hand-in-hand unless and until the latter has been specifically carved out and transferred elsewhere. No authority was cited to support the proposition that an asset can have a floating beneficial ownership any more than a contract can have a floating proper law.

127. The next question relates to the effect of BCA1 and BCA2. As set out above, BCA1 was never signed, but it seems to me that it is likely to represent the best evidence of the true situation before it became apparent that changes needed to be made in order to procure payment to Bernie's personal account. Clause 1 contained an undertaking that PBP was the *"legal and valid holder of the Bonds"* holding them in its own name and not on behalf of any Indian entity. It does not seem to me that this is necessarily inconsistent with the Bonds being held on trust for a third party other than an Indian entity, although I have already concluded that this was not the case.

128. Importantly, however, clause 4 of BCA1 stipulates that after conversion the shares are to be held in Elara's depository account on behalf of PBP. This would be consistent with Condition 6.2.3(i) of the Subscription Agreement which envisaged the converted shares being held by a nominee. As such, BCA1 seems to have contemplated that PBP would be at least the beneficial owner of the shares.

129. In the event, BCA1 never became effective, being substituted by BCA2. The evidence, borne out by the contemporaneous documents, was that Elara was unwilling to act as conversion agent on the basis of BCA1 because of regulatory requirements which prevented it from paying the proceeds of sale to Bernie in circumstances where PBP was the registered bondholder. Elara (I assume Mr Mammen) therefore amended the text of BCA1 so that it became instead an agreement with Bernie rather than PBP. Bernie was stated to be the bondholder and the recitals recorded that Bernie as bondholder was the beneficial owner of the Bonds held in the name of PBP. Clauses 1 and 4 remained unchanged save for the substitution of *"Bondholder"* (i.e., Bernie) in place of PBP.

130. A track changed version of the agreement was sent by Mr Mammen to Bernie who signed and returned it saying that *"I had no change to the track you sent!"* Thus BCA2 became the operative document.

131. In so far as BCA2 purported to record that Bernie was already the legal and valid holder of the Bonds, it was of course untrue. On any view, the legal holder was PBP. However, both Bernie and Frank also vehemently denied that the beneficial ownership of the Bonds was ever held by Bernie. This was hardly the most attractive position for them to adopt since it meant that either:

    i) Both Bernie and Frank were lying in their oral evidence and BCA2 correctly recorded that Bernie was the beneficial owner of the Bonds (albeit still incorrectly reciting that he was also the legal owner); or

    ii) Bernie had deliberately signed BCA2 knowing full well that it was untrue and misleading. In other words, it was a mere device to allow circumvention of

Elara's regulatory requirements which was condoned by Frank notwithstanding the potential detriment to PBP's interests.

132. This is a distasteful choice but, having heard the oral evidence and looked at the documents, I am not persuaded that the Bonds were ever owned by Bernie either legally or beneficially, whether before or after the conclusion of BCA2. In so far as BCA2 purported to say the contrary, it was untrue. In particular:

i) In his third witness statement, Bernie said that Elara's compliance department had refused to approve BCA1 and that he had discussed this problem with Elara and been told that it would be much easier to get approval if the account were in his personal name. He said that he was happy to sign whatever amended version Elara proposed because he saw it as the only way in which the Bonds could be successfully converted. However, it was never intended to reflect any actual change in beneficial ownership.

ii) Frank Högel was also adamant that Bernie was never the beneficial owner of the Bonds and that they were always legally and beneficially owned by PBP.

iii) The evidence is unclear as to whether Bernie discussed BCA2 with Frank before signing it. Although it was pleaded that BCA2 was signed with the consent and authority of PBP, Frank's oral evidence was that he did not in fact see BCA2 until after it had been signed but was nonetheless happy to go along with it because there was no other option to get the proceeds paid.

iv) PBP was not a party to BCA2, which was concluded only between Elara and Bernie. It cannot therefore have directly affected PBP's position and even if PBP in the guise of Frank Högel subsequently saw and approved its terms, it is not immediately apparent how it can have amounted to a ratification of anything since (a) BCA2 did not record any purported transaction by PBP, such as a transfer of beneficial ownership or the creation of a trust, which could be ratified; and (b) any such transaction could only have been ratified by PBP if it had been effected by Bernie purporting to act as its agent with authority to do so: *Bowstead & Reynolds on Agency (22nd ed.)* §2-063. The wording of BCA2 was inconsistent with Bernie purporting to act as an agent for PBP and there was no other document before the court purporting to effect such a transfer or creating any trust.

v) The reference in Mr Mammen's email of 14 February 2018 seeking confirmation from Bernie that he wished to convert *"Bonds held by you in the name of Peter Beck & Partners"* is to my mind inconclusive. It could signify (as Mr Kimmins submitted) that the Bonds were held beneficially by Bernie, but it could also mean that they were held in a very general sense by Bernie through his ownership of PBP, or even that they were nominally held by Bernie on behalf of PBP. Without the benefit of hearing oral evidence from Mr Mammen which might have allowed me to assess how he used and spoke English, it is impossible to tell.

vi) Mr Kimmins is correct to say that the easy solution to all Bernie's problems would have been for him to take an outright transfer of the Bonds and/or the shares. But in his oral evidence, Bernie explained why this would not have been

to his taste. Not only might there have been tax implications, but he also did not want his assets to be publicly revealed, for example as a result of court proceedings. This had some plausibility. It is true that Bernie paid no tax at all in Namibia, but he remained a German citizen and it is unclear what his tax position would have been in Germany. Moreover, I have little doubt that Bernie would have been concerned to keep himself as judgment-proof as possible and for that reason alone would have been reluctant to hold assets in his own name. I was less impressed by his suggestion that holding assets in his own name would render him liable to kidnap or blackmail in Namibia, not least because this concern was belied by a Custody Agreement that he subsequently concluded with PBP on 27 April 2018 providing for him to hold certain of PBP's assets in his own name as custodian on behalf of the company.

vii) If Mr Kimmins was right that BCA2 reflected the true position, it is difficult to understand why BCA1 was ever thought necessary.

viii) Creating a fiction in the form of BCA2 so as to facilitate payment of the share proceeds into his personal account is all of a piece with Bernie's other misrepresentations and falsehoods referred to above designed to persuade BDL and other institutions to permit payment into his personal account of funds destined for his companies.

133. Taking all these matters into consideration, I am satisfied that BCA2 was a device for securing payment of the share proceeds into Bernie's personal account without removing the assets themselves from PBP and that it was either concocted by Bernie together with Elara, or devised by Elara and willingly acquiesced in by both Bernie and Frank.

134. In his oral evidence, Bernie repeatedly relied upon the Custody Agreement referred to above as justification for BCA2. The evidence was somewhat sparse as to the circumstances in which this agreement was concluded but in my view it is a red herring. The Custody Agreement appointed Bernie as custodian to hold assets, at PBP's request, in his own name on behalf of PBP and to receive income in relation to any such assets in his possession, such income to be distributed in accordance with PBP's instructions. It covered, but was not limited to, *"Specified Securities"* which had been separately identified in writing. Contrary to Mr Kimmins' submission, this did not in my judgment require any specific written allocation or request to hold securities other than in relation to *"Specified Securities"*. Clause 9.2 expressly warranted that the assets to be held by Bernie under the Custody Agreement were beneficially owned by PBP.

135. Although post-dating BCA1 and BCA2, the Custody Agreement was said to be relevant because it formalised a pre-existing informal oral agreement between Bernie and PBP to the same effect. It seems to me inherently quite likely that there was some such agreement in place prior to 27 April 2018; after the Panama Papers debacle, it would have been an obvious step for PBP/Bernie to take so that Bernie could continue to manage PBP's investments effectively. What was not explored in the evidence, however, was whether the previous informal custody agreement contained a like warranty to clause 9.2. If it did, then it could only have been relevant if the Bonds were held beneficially for PBP, in which case it would have been inconsistent with the literal wording of BCA2 but consistent with my finding that BCA2 was simply a device. If

not, it adds nothing to BCA2. Either way, it does not in my view take the matter any further.

136. For all these reasons, I conclude that the Bonds were at all times both legally and beneficially owned by PBP.

137. The fact that I reject Prakash's case on this point does no credit whatsoever to either Bernie or Frank. Bernie was on his own admission in a difficult position after his companies' offshore accounts were closed since the only account into which he could receive payment thereafter was his own personal account. He therefore had somehow to facilitate the use of this as a clearing account for all the companies. It is abundantly clear, however, that this created regulatory problems for banks and other institutions and that in order to circumvent these problems, Bernie was prepared to play fast and loose with legal and regulatory niceties, even to the extent of putting his name to potentially serious misrepresentations which he knew to be untrue. In this he was at least tacitly supported by Frank.

138. It may well be that he and Frank did not regard themselves as doing anything morally reprehensible since Bernie and his family were in any event the sole shareholders of PBP. But such rules exist for a reason and are not lightly to be flouted. Whatever his motives, the fact is that Bernie was prepared to put his name to documents containing statements which were untrue to his certain knowledge, such as BCA2 and the letters representing him to be a director of PBP.

139. I completely reject Bernie's oral evidence that he did not notice the differences between BCA1 and BCA2 (and specifically the assertion in BCA2 that he was the beneficial owner of the Bonds) until he was preparing for trial. His email to Mr Mammen referred to in paragraph 130 above in which he confirmed that he had no changes to make to the tracks sent by Mr Mammen is evidence to the contrary and, for the reasons already explained, I am not prepared to give Bernie the benefit of the doubt in this respect. His subsequent suggestion that he may not have received the tracked version was blatantly untrue.

140. Frank's evidence concerning BCA2 was equally unimpressive. He told the court that he did not see BCA2 until after it had been signed and that Bernie had not told him about it in advance. He accepted that BCA2 was inaccurate insofar as it represented Bernie to be the legal and beneficial owner of the Bonds but was decidedly reluctant to say whether he ever raised this inaccuracy with Bernie after he became aware of it. Rather he said that it did not matter what was in BCA2 because everything was done on behalf of PBP. This was remarkable and suggested that he was completely unperturbed by fact that his authority to Bernie extended to the production of false and misleading documents.

141. The role of Elara in all this, and that of Mr Mammen in particular, also raises a number of questions. Elara knew that PBP was the registered bondholder and in those circumstances, it is surprising, to say the least, that Mr Mammen considered it proper to include in BCA2 a warranty that legal ownership was held by Bernie. However, without the opportunity to hear from Mr Mammen I do not propose to venture any answers to those questions.

142. Mr Kimmins invited me to infer from this web of subterfuge that documents and/or recordings helpful to Prakash's case had been withheld or destroyed. I simply do not know whether Bernie recorded any other conversations with Mr Mammen, but it is true that the court did not have the benefit of all the documents which it might have expected to be produced. In particular, it is unfortunate that Mr Mammen's email attaching the track changed version of BCA2 was not contained in PBP's disclosure. Mr Kimmins suggested that this might have revealed much about the true reason for signing BCA2 and that its absence was suspicious, although Bernie insisted that it had not been deliberately suppressed. Moreover, as Mr Spink pointed out with some force in his closing submissions, the documents for disclosure were collated by PBP's solicitors at a time before the "no loss" argument had even been pleaded and it would have been very odd for Bernie to suppress Mr Mammen's email but not also BCA2 itself. In any event, I cannot infer that any missing documents or recordings would necessarily have supported Prakash's case; there may be other reasons why they are not available. What is clear is that Bernie likes to operate as much as possible under a cloak of secrecy and in my judgment the overwhelming likelihood is that, for the reasons already discussed, his intention was always to keep the Bonds and shares in the legal and beneficial ownership of PBP and that he merely created an appearance that he held beneficial ownership in order to facilitate payment to his personal account.

143. My findings so far dispose of scenarios ii), iii) and iv) above and it remains only to consider whether the legal and beneficial title to the shares themselves was somehow vested in Bernie. However, if the legal and beneficial ownership of the Bonds remained with PBP, PBP would *prima facie* also be the legal and beneficial owner of the converted shares. Mr Kimmins referred to an email from Bernie to Mr Mammen on 19 January 2018 in the following terms:

"At the same time we must not forget that the converted shares must go into my (personal) account (or if you can call it an account) with the [redacted] Fund. How will this be achieved? By transferring the certificates into my personal name? Or can we do this just the way we are trying to do this in the case of [redacted] which means PBP and Okommo will exercise their FCCB's, but then they will be put into my (personal) account with the [redacted] Fund."

144. Mr Mammen's response to this query appears to be contained in an email of 22 January 2018:

"The account we use will depend on what you intent [sic] *to do, while [redacted] you may have to hold for as long as the legal case continues, Prakash I suppose you will convert only what is required and sell the shares immediately.*

Involving the funds will take time, as both the fund administrators will have to be involved, you will have to subscribe to new units, to then sell, the units will have to be redeemed, an NAV will have be [sic] *calculated etc etc.*

…

We can discuss the option best suited to you and proceed accordingly."

145. In cross-examination Bernie explained that this suggestion was based on him holding the shares pursuant to the informal custody agreement and that the Fund referred to was

in fact an Oyster Fund held by Elara in Mauritius. It is evident that using this Fund would have been problematic and there is nothing to contradict Bernie's evidence that the suggestion was never progressed.

146. Apart from BCA2, therefore, there is nothing to suggest that either legal or beneficial ownership of the shares was ever transferred to Bernie. But if BCA2 did not effect or recognise any transfer of the beneficial ownership of the Bonds, and was simply a device to secure payment to Bernie's account, it is difficult to see how it could have transferred ownership of shares which, *ex hypothesi*, did not yet exist at that date. No other mechanism was suggested by Mr Kimmins by which either legal or beneficial ownership of the shares could have been transferred to Bernie and I am therefore unable to conclude that any such transfer took place. Mr Kimmins was constrained to accept in his written closing submissions that it was impossible for Prakash to say how the state of affairs for which he contended had been achieved.

147. In short, on the basis of the evidence before me, I find that legal and beneficial ownership of both the Bonds and, subsequently, the converted shares remained with PBP at all times and that PBP has title to sue for the losses which are alleged to have resulted from the delays in conversion. Insofar as Elara was obliged under BCA2 to pay the sale proceeds to Bernie, then Bernie was under a duty to account for those proceeds to PBP as beneficial owner.

148. Whilst not strictly relevant to the question of ownership in February 2018, it is noteworthy that when Elara remitted the proceeds of the second and third tranches of converted shares in November 2018, they identified the beneficiary as *"Bernd Hogel, Peter Beck and Partner Vermögensverwaltung GmbH"*. If the shares were indeed owned beneficially by Bernie, there would have been no need to mention PBP in the remittance instructions at all.

149. For completeness, I reject Mr Kimmins' further argument that because the shares were held by Elara in its depositary account in its own name, only Elara had title to sue for losses incurred on sale. Condition 6.2.3 of the Subscription Agreement contemplated that the converted shares could be held through a nominee and clause 4 of BCA2 (and, so far as relevant, BCA1) is consistent with Elara performing this role. Even if BCA2 was ineffective in affecting title to the Bonds, it seems to me that it can nonetheless be relied upon as evidence that Elara was never intended to have title other than as a nominee with a corresponding duty to account to its principal. Indeed, Mr Kimmins all but conceded this point in closing.

150. Had I concluded that PBP had neither legal nor beneficial title to the shares, I would not have accepted Mr Spink's submission, relying on *Pegasus Management Holdings SCA v Ernst & Young*, [2012] P.N.L.R. 24, that PBP was nonetheless entitled to claim for losses suffered by Bernie as owner of the shares. I do not consider the case to be analogous. In *Pegasus*, the defendant's negligence caused the value of an asset to be less than it should have been. The asset was subsequently assigned, together with the cause of action against the defendant. The defendant argued that the assignor had ceased to suffer any loss after the asset had been disposed of, and that since the assignee could only sue in respect of the assignor's loss, there was no longer any loss to be recovered. This argument was rejected by Mann J who held that the assignor's loss had been sustained prior to the assignment and was not avoided or made good in any way

by the assignment. Accordingly, it continued to exist and could be recovered by the assignee as part and parcel of the assigned cause of action.

151. By contrast, the present case does not concern a damaged asset but relates to a contractual right to receive shares on time where the damage consists of profits lost on disposal of the shares. If the shares were never owned legally or beneficially by PBP but only by Bernie, I do not see how the breach of PBP's contractual right could have caused it any loss. As submitted by Mr Kimmins, *Beswick v Beswick,* [1968] AC 58 would appear to be a complete answer to the point.

152. I have a similar difficulty with *Glory Wealth Shipping Pte Ltd v Flame SA,* [2016] EWHC 293 (Comm) on which Mr Spink also relied. In that case, a shipowner had a contractual right to receive freight but directed that payment should be made to a third party. The court held that the shipowner had nonetheless suffered a loss by virtue of the charterer's non-payment and could sue to recover the unpaid freight. Again, however, the analogy with the present case is not exact. If PBP had remained the legal and beneficial owner of the Bonds but had directed the shares to be put into Bernie's name, there is no doubt that PBP would have had title to sue for the breach of contract in converting the shares late. But I am far from convinced that PBP's loss as bondholder is necessarily to be measured by reference to Bernie's loss as holder of the shares.

153. These are interesting questions, but since they do not arise on my findings, it is unnecessary to express any concluded view on them.

Date of breach

154. Three separate issues arose in relation to ascertainment of the relevant date of breach.

Start date

155. The first was whether the 14-day time limit for the issue of shares started running from the date on which a Conversion Notice was deposited with Elara or only from the date on which Prakash received from Elara the Conversion Agent Conversion Notification ("CACN") which Elara was required under the Agency Agreement to send once it had checked that the Conversion Notice was in order. Condition 6.4.1(iv) simply refers to *"the date of receipt of the original conversion notice".*

156. I have no doubt whatsoever that the relevant date for these purposes is the date on which a compliant Conversion Notice is served by the bondholder on Elara:

i) Condition 6.2.1(i) states in terms that a conversion right is exercised by deposit of a Conversion Notice in the prescribed form with the Conversion Agent and contains specific provisions for determining precisely when such deposit is deemed to take place;

ii) Condition 6.2.1(iii) further provides that the Conversion Date is deemed to be the date when the Conversion Notice and all relevant accompanying documents are delivered. In context this must mean delivered to the Conversion Agent, since the Subscription Agreement does not contemplate delivery of the Conversion Notice to anyone else;

iii) Elara was expressly appointed under the Agency Agreement for the purpose of maintaining a record of bondholders *"and to facilitate transfer of the Bonds and the conversion of Bonds into equity"*. Clearly, therefore, Elara had authority to receive Conversion Notices on behalf of Prakash.

iv) Certainty is important and the start of the contractual time limit should not be subject to the vagaries of internal communications between Prakash and its Conversion Agent. In this context, Condition 6.4.1(iv) of the Agency Agreement must read as referring to receipt by or on behalf of the issuer.

157. Time therefore starts to run when a compliant Conversion Notice is deposited with Elara. In my judgment, the contrary is virtually unarguable.

Calendar or business days

158. The second was whether time under Condition 6.2.3(i) was to be calculated by reference to calendar or business days. By the conclusion of the hearing, Mr Spink had conceded that the correct measure was business days. It is therefore unnecessary for me to take up space explaining why I would in any event have reached the same conclusion.

Instruction to delay CN2?

159. It was the evidence of Mr Verma that, following receipt of CN2, he was informed by Mr Mammen in mid-May 2018 (when Prakash was in the middle of a closed period) that PBP was about to issue a third conversion notice and advised that Prakash should process them both together. He understood this as an instruction to defer conversion pursuant to CN2 until CN3 had also been received. Mr Kumar gave supporting evidence to the effect that this is what he had been given to understand by Mr Verma.

160. PBP denied that any such advice, let alone any instruction to this effect, had been given by Mr Mammen. It relied upon a hearsay statement from Mr Mammen stating that he could not recall having mentioned anything about a third conversion notice to Prakash prior to 11 June 2018 when CN3 was actually served. Furthermore, PBP's evidence was that nothing was ever said by PBP to Mr Mammen about delaying CN2. Mr Mammen therefore had no authority from PBP to say what he is alleged to have said and Mr Verma cannot reasonably have thought that he did, since Prakash was wholly unaware at this stage that Mr Mammen held a dual role as agent also for PBP.

161. All in all, I find the evidence on this point unsatisfactory. On the one hand, it seems unlikely that Mr Verma would simply have invented this conversation. He could not have known when he gave his statement that Mr Mammen would not be giving evidence to contradict him. Nor, indeed, was he cross-examined on the basis that no such conversation took place. Something, therefore, may well have been said.

162. And if Mr Mammen did say something to this effect, it seems implausible that he would have done so entirely unprompted by Bernie. I accept that Mr Verma understood Elara to be Prakash's agent and had no reason to suppose that Mr Mammen had any authority to act on behalf of PBP but he would on any view have had authority to pass on messages and Mr Verma would therefore have been entitled to assume that Mr Mammen was relaying something that Bernie had asked to be passed on.

163. Mr Mammen clearly has many questions to answer but he was not called by either party and was apparently reluctant to give evidence. While his hearsay statement says that he does not recall having said anything about a third conversion notice prior to 11 June 2018, importantly he does not categorically deny that a conversation took place as alleged by Mr Verma. Moreover, Bernie's evasiveness under cross-examination about a conversation which he subsequently had with Mr Mammen leading to Mr Mammen's hearsay statement also makes me suspect that something was said.

164. Nonetheless, the oddity of Prakash's case is that the advice to delay was supposedly given in mid-May, a matter of days after CN2 had been served and, so far as the evidence goes, long before Bernie had apparently said anything even to Mr Mammen about a third conversion notice. On the contrary, the tenor of the disclosed Skype exchanges between Bernie and Mr Mammen are inconsistent both with any suggestion that Bernie had placed CN2 "on hold" and with any intention prior to 11 June 2018 to issue CN3. I also have difficulty in understanding why such an instruction would have been given in mid-May when Prakash was in the middle of a closed period and not doing anything anyway.

165. Mr Kimmins suggested, somewhat ambitiously, that Bernie had given the instruction because he hoped to take advantage of a market rise at the end of May. However, even if Bernie had anticipated such a rise, for all he knew it might have been very short-lived (as in fact it was) and I am far from persuaded that he would have taken such a gamble. Nor do I accept Mr Kimmins' alternative suggestion that the instruction to delay was given in order to minimise PBP's exposure to CGT. CGT only represented a small percentage of any sale profits and I accept PBP's evidence that while it might have been a factor in deciding how much to convert and when, it would not have been a sound reason for delaying once a conversion notice had been issued.

166. There is no internal record of the conversation and no other document to support the supposed instruction. Prakash's case rests only on the recollection of Mr Verma. It is also noteworthy that Prakash did not rely on the supposed instruction as an excuse when PBP complained about the delay in conversion on 28 June 2018. Prakash bears the burden of proof in this respect, and the oddities referred to above and the lack of independent documentary evidence leave me in real doubt as to exactly what was said or when.

167. In these circumstances, I am unable to find affirmatively that Prakash was instructed or entitled to believe that it was instructed to delay CN2 until CN3 had been received.

Conclusion on date of breach

168. It was common ground that compliant conversion notices were served on 14 February 2018 (CN1), 2 May 2018 (CN2) and 11 June 2018 (CN3).[6] As I have held that there was no instruction to delay conversion of CN2, the date of breach therefore falls 14 business days after the relevant date in each case.

PBP's primary claim for damages

[6] References in the evidence to errors in CN2 were accepted by Prakash to relate to the CACN rather than CN2 itself.

169. As already noted, Prakash's share price reached a peak in January 2018 and broadly fell throughout the remainder of the year. It rallied from time to time although it never recovered to its January level, and the overall trend was inexorably downwards.

170. In these circumstances, PBP's primary claim for damages is based solely on the delay relating to CN1, notwithstanding that PBP in fact realised more for the shares than it would have done had they been issued timeously. The argument is that if CN1 had been converted on time, Bernie would have proceeded to liquidate the entirety of his bondholding at the top of the market and so netted much greater profits than he actually achieved.

171. The claim is therefore for the loss of those profits which PBP might have hoped to make and PBP needs to prove both (i) the profits it says would have been made on this hypothesis *and* (ii) that the loss of those profits is not too remote a consequence of the delay in converting CN1. Mr Kimmins attacks on both fronts, viz, causation and remoteness. He submits that the evidence does not support the trading strategy that Bernie claims he would have adopted and that in any event, the loss claimed is too remote. His case is that damages should be calculated in accordance with the ordinary market rule by reference to the difference between the market value of the shares on the date they should have been delivered and their market value on the date they were in fact issued. On this basis, there would be no claim in respect of CN1 because the market in fact rose between these two dates. Mr Kimmins accepts that there would be separate breaches and separate claims in respect of CN2 and CN3.

172. I propose to start by considering the question of remoteness on the assumption that PBP has successfully established the loss as put forward in the counterfactual.

173. It is not in dispute that Prakash's shares were a tradeable commodity in which there was an available market. In these circumstances, the market rule *prima facie* applies unless the losses claimed can be brought within one or other limb of *Hadley v Baxendale* (1854), 9 Exch. 341: see *The Elena d'Amico,* [1980] 1 Lloyd's Rep. 75 at 87:

> *"Of course, the normal measure set out in sub-s. (3) of the [Sale of Goods] Act is only a prima facie rule. The principle set out in sub-s. (2) remains the governing principle; and so in sale of goods, and likewise, in my judgment, in the case of a claim for damages for repudiation of a time charter-party, the plaintiff can recover damages beyond the normal measure if those damages fall within the principle in* Hadley v Baxendale. *To take a well known example in the case of sale of goods, if you have a case where the damages are enhanced y the known impecuniosity of the plaintiff, then those enhanced damages may be recovered: see, for example,* Trans Trust S.P.R.L. v Danubian Trading Co. Ltd., *[1952] 1 Lloyd's Rep. 348; [1952] 2 Q.B. 297.*

174. Were the profits which PBP seeks to recover within either limb of *Hadley v Baxendale*? It was common ground that there had been no pre-contractual discussion about Bernie's particular trading strategy. There is therefore no reason why Prakash would have had any knowledge of Bernie's particular approach to convertible bonds. Limb 2 is therefore not engaged and, indeed, Mr Spink did not put his case in this way.

175. As to whether the case falls within limb 1, the question posed in *Hadley v Baxendale* is whether the loss was such as may fairly and reasonably be considered as arising naturally from the breach in question, or whether the parties may reasonably be

supposed to have had this loss in contemplation at the date of the contract as the probable result of such breach. However, as Lord Reid made clear in *The Heron II,* [1969] 1 AC 350, these are but two different ways of saying the same thing. Moreover:

"… the court did not intend that every type of damage which was reasonably foreseeable by the parties when the contract was made should either be considered as arising naturally, i.e., in the usual course of things, or be supposed to have been in the contemplation of the parties. Indeed the decision makes it clear that a type of damage which was plainly foreseeable as a real possibility but which would only occur in a small minority of cases cannot be regarded as arising in the usual court of things or be supposed to have been in the contemplation of the parties: the parties are not supposed to contemplate as grounds for the recovery of damage any type of loss or damage which on the knowledge available to the defendant would appear to him as only likely to occur in a small minority of cases."

176. In his view, the crucial question was whether on the information available to the defendant when the contract was made, he should reasonably have appreciated that the loss was *"sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation."*

177. Whichever way the test is framed, however, it is the delay in conversion pursuant to CN1 which is the relevant breach for this purpose. However, in the same way that the plaintiff in *Hadley v Baxendale* failed to recover the lost profits of his mill following the delay in redelivery of the repaired crankshaft, I am not satisfied that it can properly be said that the delay in relation to CN1 would naturally lead in the usual course of events to a loss of profits on the entirety of PBP's bondholding. Nor, in my judgment, is this something that Prakash could or should reasonably have contemplated.

178. This is for the following reasons.

179. First, there are two aspects to consider in relation to the realisation of profits from converting bonds: (i) the timing and amount of any conversion notice and (ii) how to set about selling the converted shares when issued.

180. Mr Spink sought to categorise Prakash as an experienced issuer of bonds although that is a questionable assertion, given that this was only its third bond issue. Be that as it may, I accept on the evidence that Prakash could and should reasonably have contemplated that:

i) A bondholder would have more incentive to convert when the market was high and less incentive when it was low and, other things being equal, would be likely to want to take advantage of high prices while they lasted;

ii) A bondholder with a holding as large as that of PBP would not convert everything in one go unless it was intending to take a long-term strategic position in the company but would be more likely to convert in tranches;

iii) Once a conversion notice had been served, the bondholder would be exposed to the risk of the market falling between the date of the conversion notice and the

date of issue, albeit this might be offset to a lesser extent by the risk of having to pay increased capital gains tax if the market went up.

181. On the other hand, precisely how a particular bondholder would go about deciding when or how much to convert, or the nature of its individual selling strategy would not, in my judgment, be within an issuer's reasonable contemplation.

182. Secondly, while it is reasonably foreseeable that markets may rise or fall, it is not foreseeable that they will necessarily move one way rather than the other. There may be all sorts of factors outside the control of the parties that trigger market movements, sometimes without warning and sometimes violent.

183. For that reason, the experts were agreed that the timing and amount of any conversion notice is a matter of commercial judgment depending on myriad factors at the time in question, including the share price and whether it was above or below parity, liquidity, the volume of shares already held, the investor's view of the market and his risk appetite. A loss of profits deriving from a concatenation of such highly individual judgment calls dependent on prevailing conditions at an unspecified time or times in the future is not something which in my judgment can be said to be "in the usual course" or within the reasonable contemplation of Prakash.

184. On the contrary, it is completely uncertain and speculative. Whether and when PBP proceeded to issue conversion notices following CN1 would depend on how the sales of CN1 had gone and on the state of the market. But, as already stated, Prakash could not be expected to know anything about an individual bondholder's particular trading strategy save in the very general respects set out in paragraph 180 above. Accordingly, it could not reasonably have contemplated that Bernie would set about liquidating his entire holding in the way that he now claims he would have done. So far as Prakash was concerned at the date of the contract, if the CN1 shares had been delivered on time, Bernie may have proceeded thereafter to liquidate the entire holding, or he may not. Moreover, I cannot be satisfied that the CN1 sales themselves would not have moved the market, no matter how carefully Bernie tried to avoid this. It may well have been that if the shares had been delivered on time and sold, the market would have moved differently to the way it actually moved, in which case the whole subsequent course of events might have been different: see, for example, the expert evidence in *Parabola Investments Ltd v Browallia Cal Ltd*, [2010] EWCA (Civ) 486; [2011] QB 477 at [13].

185. Thirdly, (and in my view decisively), the profits claimed were not lost because CN1 was converted late but because the market fell and continued to fall. However, the delay in converting CN1 did not itself cause the market to fall. Nor is this something which at the date of the contract could reasonably have been contemplated as ordinarily flowing from the delay in converting CN1 or as a not unlikely consequence of the breach. The fall in the market was not a consequence of the breach at all.

186. Nor, in itself, did the breach cause Bernie to incur any trading losses. The highest that the case can be put is that it deprived PBP of the *opportunity* to earn profits. But if the market had remained high, PBP would have suffered no loss at all. In my judgment, therefore this is not a case where Bernie's subsequent actions were caused by the original breach. His decisions in this regard were made *"in the context of a pre-existing wrong"* but did not *"arise out of the transaction":* see *The Elena d'Amico (supra)* at 89. It is irrelevant that those decisions were reasonable or sensible. He could have

served further conversion notices as he now says he had planned to do, but he decided not to in the light of the market conditions as they existed *at that time.* This was a business decision based on Bernie's individual exercise of judgment.

187. In the words of Lord Reid in *The Heron II,* was the claimed loss of profits on the entire bondholding sufficiently likely to make it proper to hold that it should have been in the contemplation of Prakash at the date of the contract? In my judgment, the answer is clearly not. It was not reasonably within contemplation that a delay in converting CN1 would *in the ordinary course* cause PBP to lose the opportunity to convert its remaining bonds. Whether such an opportunity would even exist, let alone be lost, would depend on (i) a combination of multiple factors, many of which were outside the control of either party, and, crucially, (ii) Bernie's commercial judgment at the time, which could not be reliably predicted in advance. See, in this context, the passages from Bernie's evidence referred to in paragraphs 200-201 below.

188. Fourthly, and following on from the previous point, the decision of the House of Lords in *The Achilleas,* [2008] UKHL 48; [2009] 1 AC 61, requires the court to consider a further factor, namely whether Prakash assumed responsibility for the loss claimed. There is a learned academic debate as to whether this is simply one aspect of remoteness, or whether it constitutes a separate requirement. Either way, I am quite satisfied, for much the same reasons as those already given, that this is not a loss for which Prakash assumed responsibility. A bond issuer does not take the risk of market movements outside its control. To hold it liable in these circumstances would be akin to placing a one-way bet: the issuer would always be liable if the market went down but could never reap the benefit if it went up. Nor can Prakash fairly be said to have assumed risks arising from Bernie's particular trading strategy (which was not specifically known to it).

189. There is an analogy here with property valuers and the line of authority flowing from *South Australia Asset Management Corp v York Montague Ltd,* [1997] AC 191 where a negligent valuer was held liable to a mortgage lender for the amount by which the latter was under-secured as a result of the negligent overvaluation, but not for the entire loss suffered by the lender which had been greatly increased following a precipitous fall in the market. Indeed, in *The Achilleas* itself, where a time chartered vessel was redelivered late and the shipowner was forced to accept a reduced rate of hire on a follow-on fixture which had been concluded when the market was much higher, damages were awarded only for the difference between the charter rate of hire and the market rate during the period of overrun. The shipowner's claim to recover the enforced reduction in hire for the duration of the follow-on fixture failed on the grounds that the combination of the delay and market volatility was either not sufficiently likely so as to bring the case within *Hadley v Baxendale* limb 1 or was not a risk for which the charterer assumed responsibility. The factors which particularly weighed with the Supreme Court were the unpredictability of the loss and the fact that the charterer had no control over either the market or the shipowner's chartering strategy.

190. Much the same can be said here. I therefore reject PBP's primary way of putting its case as a matter of principle.

191. It is therefore unnecessary to deal at length with the counterfactual scenario put forward by PBP and I trust that the experts will forgive me if I do not discuss their evidence in the detail which their very helpful reports would otherwise have merited.

192. Mr Kimmins attacked the counterfactual on the facts, submitting that it had not been established that Bernie would have acted as pleaded. In support of that submission, he pointed to the fact that Bernie's actual actions were in some respects at odds with what he says was the normal trading strategy that he would have adopted. However, it is difficult for Prakash to rely on what Bernie actually did in order to undermine what he says he would have done if there had been no breach. *Ex hypothesi*, his actual conduct took place in the context of Prakash having committed a breach of contract. In a volatile market, this is no reliable guide to what he would have done if there had been no breach. For example, Mr Kimmins relied on certain documents which suggested that Bernie was willing to sell shares of some $2-3 million and wait for the rest. But this was in April 2018, by which time the market had already declined. I refer to my comments in paragraph 184 above: in this respect what is sauce for the goose, is sauce for the gander.

193. Had it been necessary to consider the counterfactual in detail, I would have had to assess very carefully what weight I could place on Bernie's evidence, bearing in mind his propensity to say whatever was most expedient and his obvious incentive to maximise PBP's claim.

194. I also bear in mind the cautionary comments of the Supreme Court in *Manchester Building Society v Grant Thornton UK LLP*, [2021] UKSC] 20; [2021] 3 WLR 81 at [26] about the dangers of manipulation in counterfactual analysis:

> *"Lord Leggatt JSC points out (paras 128-132) that the counterfactual test can yield the right result if it is properly applied. However, the more one moves from the comparatively straightforward type of situation in the valuer cases, as illustrated by* SAAMCO, *the greater scope there may be for abstruse and highly debatable arguments to be deployed about how the counterfactual world should be conceived. One has to take care, therefore, not to allow the counterfactual analysis to drive the outcome in a case. To do so would create a risk of litigation by way of contest between elaborately constructed worlds advanced by each side, which would become increasingly untethered from reality the further one moves from the relatively simple valuer case addressed in* SAAMCO*."*
>
> As the argument proceeded, it seemed to me that these words were particularly apt in this case. Indeed, Mr Mou sounded a similar note of caution in his first report.

195. As for the counterfactual itself, Mr Corry's reconstruction was based on such paucity of data as to render it wholly inadequate in my view for the purpose of establishing on a balance of probabilities what Bernie's actions would have been but for the breach. I hasten to add that this was in no way his fault. The fact is that there was no evidence at all before the court relating to any conversions that Bernie had previously carried out and accordingly the only data points available to Mr Corry derived from what Bernie actually did following the breach in this case. For the reasons already given, this is hardly a reliable guide as to what he might have done in other circumstances had there been no breach.

196. There was also the question of the cut-off point. Mr Corry excluded any data relating to the period after 16 November 2018 for reasons which, albeit logical and not unreasonable in themselves, were necessarily subjective and rendered the cut-off date somewhat arbitrary.

197. I accept that Bernie was not interested in a long-term equity investment in Prakash and his intention was to convert the bonds into shares and sell at a profit when the market was high. I also accept that he would not have attempted a block trade and that he would therefore have converted the bonds in tranches. The experts were agreed that a reasonable investor would likewise have exited his holding in stages, with the timing of each conversion depending on the selling rate of the previous tranche of shares. In this context, the critical consideration was that an investor would be exposed to the risks of market volatility (i) between service of the conversion notice and the eventual issue of the shares; and (ii) between the issue of the shares and their eventual sale. A release of too many shares at once would depress the share price, forcing the investor to sell over a longer period and thus be exposed for a longer period to the risk of volatility.

198. For this reason, an investor holding this number of bonds would not convert them all at once but would do so by what Mr Corry described as a "gradual" process. Mr Mou did not like the word "gradual" as to him it denoted something rather cautious. His preferred term was "opportunistic". In truth this was a distinction without a difference and both experts were saying much the same thing. However, Mr Mou's term to my mind better captures the nature of the exercise which depends critically on snap judgments being made as to conditions in the "here and now".

199. Based on the available data, Mr Corry attempted to identify patterns of behaviour from which he could derive a set of "trading rules" by which it could be assumed that Bernie would have conducted himself had there been no breach. These trading rules covered matters such as volume targets, trading limits and the timing of conversion notices. However, it seemed to me that this approach was open to two fundamental criticisms. First, bearing in mind the limitations of the data as referred to above, it had no really solid evidential underpinning. Secondly, trading is not an exercise which to my mind is susceptible of being reduced to a set of rules at all, certainly not to this degree of prescriptiveness. In truth, it was a brave attempt to rationalise an exercise which was ultimately one of commercial judgment and gut instinct based on myriad factors. Mr Corry himself accepted that it was largely subjective, and in this respect, I agreed with Mr Mou who described it as an exercise in hindsight trading.

200. Indeed, the inherent unpredictability of trading was effectively confirmed by Bernie himself in paragraph 24 of his first witness statement, where he stated that he only decided *"very roughly"* on the amount to convert each time, and also in paragraphs 33-34 where he said:

> *"In terms of deciding when to convert, I usually consider converting when parity is around 125-130%. This generally gives enough buffer to still convert and sell at a profit even if the share price movement turns negative. However, many factors such as the state of the economy, general market confidence, the volatility of the share price and liquidity of the shares, and my overall opinion of the issuer will all play a part in my decision as to whether to convert or not…*
>
> *Our strategy of not converting too many bonds in one go was also influenced by the Indian Capital Gains Tax. We would have to pay capital gains tax on any increase in value of the shares between receiving the converted shares and selling them… This can make a big difference, because a big increase in price between the time of acquisition and time of sale would mean a lot of tax."*

201. Further, in paragraph 45 of his first statement, he admitted that he had no set formula for setting his daily volume limits, while in paragraph 22 of his third statement, he confirmed that he himself did not know how the share price would move when he made the decisions he did and pointed out that trading is not an exact science. Indeed, in one contemporaneous email sent on 16 April 2018 he confessed that *"Honestly, I was/am not sure if I would scare the market by spending so much right away."*

202. To my mind, this all demonstrates the ultimate futility of trying to recreate a supposed trading pattern for the purposes of counterfactual analysis and the expert evidence only served to underline the artificiality of the exercise. Quite apart from anything else, the proposed counterfactual begged the all-important question of whether the market would in fact have remained sufficiently high for Bernie to want to liquidate PBP's entire holding, or whether it might have started to fall earlier if substantial quantities of shares had been offloaded.

203. In these circumstances, I find it impossible to reach any conclusions as to an appropriate counterfactual beyond the undoubted fact that Bernie would have wanted to take advantage of high prices while they lasted and that once a conversion notice had been issued, he would have wanted to sell promptly. In particular, I do not find the evidence sufficient to enable me to predict how much Bernie would have converted, or when, or how long it would have taken him to sell the shares, or even whether he would have managed to sell all of them at all. I therefore find that the proposed counterfactual scenario is not proved on a balance of probabilities.

204. Mr Spink, however, relied on *Parabola Investments Ltd v Browallia Cal Ltd (supra)* to argue that the counterfactual is only relevant to quantification and that provided it can be established that Bernie's trading strategy would have been disrupted to some extent, it is open to the court to assess damages as best it can. It therefore does not matter if the counterfactual cannot be established on a balance of probabilities since the court can simply assess the loss by reference to what a reasonable person would have done (presumably on the basis that a claimant is under a duty to mitigate and so is effectively limited to recovering the profits that a reasonable person in his situation would have made). Mr Kimmins' riposte was that the suggested counterfactual went well beyond mere quantification of an already established loss but rather concerned the very existence of the loss in the first place.

205. In *Parabola*, Mr Gill had been deprived of a trading fund by the defendant's deceit. The court found as a fact that he would have invested that fund and (by reference to his previous trading record over a period of time) would have made profits from it. The head of loss was therefore proved on a balance of probabilities and the only difficulty was to quantify exactly how much profit he would have made. It should be noted that this was a case in deceit, where the rules of remoteness are in any event more generous. However, I do not regard the situation here as analogous. Mere disruption of Bernie's trading strategy does not of itself mean that PBP would inevitably suffer a loss. That would depend on the market. There is therefore nothing – independent of the counterfactual itself – to show that the delay caused any loss. But if the counterfactual has not been proved, I am left in the situation where the loss itself has not been proved. This further confirms why, in my judgment, PBP's primary claim is misconceived as a matter of principle.

206. Even if I had accepted the counterfactual analysis, it is common ground between the experts that Bernie's conduct in selling only 2% of the shares between 11 September 2018 and 16 November 2018 at prices lower on average than the volume weighted average price over the same period was unreasonable. Credit would therefore have had to be given against PBP's actual losses for a failure to mitigate in this respect, as well as for the actual proceeds received following CN1-3 (including the gain made on CN1) and for the remaining Bonds. Given my finding that the primary claim is misconceived in principle, however, it is unnecessary to address these matters further.

207. One further point of interest arose in the context of the counterfactual. The evidence of Mr Mou was that, in practice, the average time taken to convert bonds of this nature was 40 days, notwithstanding that Prakash was under a contractual obligation to deliver the shares within 14 business days. Mr Kumar likewise testified that 14 days was impractical, whatever the contract said, and in this respect I note that the Indian regulator allowed 21 days for just one specific part of the process. The counterfactual nonetheless assumed that each successive tranche of shares would be delivered 14 days after service of the relevant conversion notice. However, there is ample evidence that Bernie became aware very soon that 14 days was unrealistic, and in my view Bernie was nothing if not pragmatic. He may well have hoped that a second conversion would run more smoothly than the first. However, if it did not, and if he did not want to be placed in difficulties by being exposed to market volatility as a result, he may well have planned his subsequent strategy on the basis that similar delays would occur with all conversion notices.

208. I found Mr Mou's evidence on this point convincing and I would therefore not have been prepared to assume that each subsequent counterfactual tranche would have been delivered in accordance with the contractual timescale. It is true, as Mr Spink pointed out, that for the purposes of a counterfactual it must be assumed that the wrongdoer complies with its contractual obligations. However, it seems to me that this principle only applies in respect of the breach sued upon. If Bernie had known that conversion might take up to 40 days, he would not necessarily have served larger conversion notices, but he may well have served his subsequent notices earlier. Again, this is all wholly speculative and, as it does not arise on my findings, I say no more about it.

PBP's alternative claim

209. In the event that PBP's primary claim was rejected, the parties were agreed that PBP in principle had valid claims for losses arising out of the delays relating to CN2 and CN3 respectively. In these circumstances, Mr Spink accepted that it would not be open to him to argue that if shares under CN2 had been delivered on time then CN3 would have been issued sooner. Conversely, as I have found above, Prakash has failed to establish that there was any instruction to delay CN2 and deal with CN2 and CN3 together. Each breach must therefore be considered separately. It follows that, even though the delay on CN1 in fact resulted in a gain for PBP, there is no basis on which this gain can properly be taken into account against losses incurred in relation to CN2 or CN3.

210. It was common ground that there was an available market for the shares at the relevant dates of breach (i.e., 14 business days after delivery of the relevant conversion notice to Elara). The market measure of loss is therefore appropriate and PBP is accordingly entitled to recover in respect of each of CN2 and CN3 the difference between the market

value of the shares on the date they should have been delivered, and the market value of the shares on the date they were actually delivered.

211. The parties further agreed that (i) no question of failure to mitigate arises if the market measure applies; and (ii) it was not appropriate to assess market value by reference to the share price on a single day. Rather it should be assumed that the shares would be sold over a period at such rate as the market could bear without itself being adversely affected.

212. The main remaining issue concerns the rate of disposal or execution rate which should be adopted for this purpose. Mr Spink argued for a rate of 7% of actual daily traded volumes on the basis that the market was relatively illiquid by then; Mr Kimmins suggested 12%. So far as the expert evidence was concerned, Mr Corry used a rate of 12.5% across all his hypothetical permutations, while Mr Mou had carried out calculations using both 7% and 12%. As he explained in his report, however, these were derived from the actual execution rates achieved by Bernie for CN1 and CN2/3 respectively. In his second report, he said that both rates were reasonable but that if an investor were aiming to liquidate his holding in a declining market, as was the case in the second half of 2018, 12% was more likely.

213. There is thus little difference between Mr Mou and Mr Corry on this point and I consider that the appropriate rate to adopt should therefore be 12%.

214. During Mr Mou's cross-examination, there was some debate as to daily trading volumes and whether these should be calculated by reference to an average of the previous 20 trading days (Mr Mou's opinion) or something longer i.e., 40 or even 60 trading days (PBP's case). Mr Mou stuck to his opinion, based on his experience and previous employments, that 20 days was the most appropriate period. He explained that if too long a period were taken, recent events would be discounted too quickly and vice versa. I found that evidence convincing.

215. In the draft judgment which I circulated to the parties I drew attention to this debate and expressed the view that the daily trading volumes to which the execution rate of 12% should be applied should accordingly be calculated by reference to an average of the previous 20 trading days. In response to the draft judgment, Mr Pourghadiri for PBP submitted that this finding was based on a misunderstanding of the evidence and invited me to reconsider the position. He stated (in essence) that:

    i) Both side's experts had approached the alternative claim on the basis that the execution rate would be applied to actual trading volumes. No suggestion had ever been made that a calculated notional trading volume should be adopted and it was unnecessary to do so given that actual trading volumes were objectively ascertainable as a matter of established fact.

    ii) The calculation with which Mr Mou was concerned did not arise in the context of retrospectively quantifying loss but in the context of prospectively assessing the maximum size of conversion notice that an investor could reasonably have served on any given date. The calculation thus served an entirely different purpose and was irrelevant to the quantification of the alternative claim.

216. I invited the Claimant to reply to these submissions which it did by means of a letter from its solicitors. It accepted that Mr Mou's calculations of the alternative claim had been based on actual trading volumes but nonetheless inviting me to maintain my draft judgment on the basis that adopting an average of 20 previous trading would ensure that spikes and outliers on any single day were not taken into account.

217. Having reflected on the matter, it seems to me that I did indeed fall into error as suggested by PBP. Re-reading the expert reports, it is clear that Mr Mou's evidence was concerned with a prospective assessment of liquidity for the purpose of calculating the size of a future conversion notice and, as such, has no bearing on the retrospective calculation of a loss by reference to trading days where the daily volumes are known.

218. For the purposes of calculating PBP's loss on its alternative claim, the execution rate of 12% should therefore be applied to actual trading volumes.

Conclusion

219. It follows from my judgment above, that the Claimant's claim for declaratory relief must be dismissed. There will be judgment for the Defendant on its counterclaim (1) in relation to the ERA claim and (2) for damages in relation to the late conversion claim to be assessed on the basis of my findings above, namely by reference to the difference between the amount that would have been realised for the shares (calculated separately for each of CN2 and CN3) had they been sold at a rate of 12% of actual daily trading volumes (i) from the date on which they should have been issued and (ii) from the date on which they were actually issued. I propose to remit the matter to the parties in the hope that they can reach agreement on the appropriate figures.

220. As requested, I will also reserve all questions of interest and costs to be dealt with as necessary on paper or at a further hearing.